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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

— — —

THE HONORABLE GEORGE C. HANKS, JR., JUDGE PRESIDING

USA, No. 4:21-CR-00009-1

Plaintiff,

vs.

ROBERT T. BROCKMAN,

Defendant.

ORIGINAL

COMPETENCY HEARING -- DAY 5 AM SESSION

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

Houston, Texas

FRIDAY, NOVEMBER 19, 2021

APPEARANCES:

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CHRISTOPHER MAGNANI, DOJ

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BORIS BOURGET, DOJ

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8 Proceedings recorded by mechanical stenography.
9 Transcript produced by Reporter on computer.

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PROCEEDINGS

(The following proceedings held in open court.)

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FRIDAY, NOVEMBER 19, 2021 -- 8:38 A.M.

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MR. LOONAM: Your Honor, for the record I note that Mr. Brockman is with us at counsel table this morning.

THE COURT: Okay. Welcome back, everyone. The Government may call the next witness.

MR. LANGSTON: Actually, Your Honor, before we call our first witness we just want to let you know we have worked things out with attorneys for UCSH. We agreed to do these depositions by zoom this weekend, and they agreed if we need those witnesses to testify they would be available to testify live next week.

THE COURT: Okay.

MR. LANGSTON: So you can take that off your mind.

THE COURT: Great. That makes things a little bit easier.

Mr. Loonam, anything to add?

MR. LOONAM: I don't have a dog in that

08:57:12 1 fight.

08:57:12 2 THE COURT: Okay. Great. Then the
08:57:13 3 Government may call the next witness.

08:57:16 4 MR. MAGNANI: Thank you, Your Honor.
08:57:17 5 Good morning.

08:57:17 6 THE COURT: Good morning.

08:57:18 7 MR. MAGNANI: The United States calls
08:57:19 8 Dr. Park Dietz.

08:57:21 9 THE COURT: Dr. Dietz, if you would
08:57:22 10 please step forward, sir.

08:57:22 11 PARK DIETZ,

08:57:22 12 (For the Government)

08:57:22 13 called as a Witness, having been duly
08:57:22 14 and regularly sworn, testified as follows:

08:57:37 15 THE WITNESS: I do.

08:57:38 16 THE COURT: Okay. Please take the
08:57:39 17 stand. I believe you've been here, so you know
08:57:41 18 about the mask rule. You can take off your mask if
08:57:44 19 you are comfortable with that.

08:57:49 20 THE WITNESS: This will be the most
08:57:50 21 comfortable day in court.

08:57:50 22 DIRECT EXAMINATION

08:57:50 23 BY MR. MAGNANI:

08:57:56 24 Q. Good morning, Dr. Dietz.

08:57:58 25 A. Good morning.

08:57:59 1 Q. Can you please state your name, and spell your
08:58:03 2 last name for the record?

08:58:03 3 A. My name is Park Dietz, D-I-E-T-Z.

08:58:09 4 Q. What do you do for a living, sir?

08:58:11 5 A. I am a psychiatrist, limiting my practice to
08:58:16 6 forensic psychiatry. And I do two things: One is
08:58:26 7 running a company devoted to forensic services to
08:58:33 8 attorneys. The other is running a company devoted
08:58:37 9 to the prevention of violence and other misconduct
08:58:42 10 in the workplace.

08:58:43 11 Q. What is forensic psychiatry?

08:58:45 12 A. Forensic psychiatry is the application or
08:58:49 13 principles and practice of psychiatry for the
08:58:52 14 purposes of law.

08:58:55 15 Q. And what education qualifies you to be a
08:58:58 16 forensic psychiatrist?

08:59:00 17 A. Well, to be a forensic psychiatrist, one must
08:59:06 18 first be a psychiatrist, and then the roots toward
08:59:09 19 psychiatry specialization vary. In my case, I did a
08:59:13 20 fellowship in forensic psychiatry at the Hospital of
08:59:17 21 the University of Pennsylvania.

08:59:20 22 Q. And can you just briefly summarize your
08:59:23 23 educational experience?

08:59:24 24 A. Yes. I graduated from Cornell with a
08:59:29 25 bachelor's degree in 1970 in Biology and Psychology.

08:59:37 1 I graduated from John Hopkins in 1975 with a Doctor
08:59:42 2 of Medicine degree and also a master's degree in
08:59:46 3 Public Health, and by then had all but completed a
08:59:50 4 dissertation for a Ph.D. in what was called Social
08:59:54 5 Relations, roughly translated to Sociology, and
09:00:00 6 later submitted the dissertation.

09:00:04 7 Q. And just what was your first job after your
09:00:06 8 residency?

09:00:08 9 A. So in order to become a psychiatrist, of course
09:00:13 10 I had to do a residency or I wouldn't have been
09:00:16 11 hireable. So I did two years of residency at Johns
09:00:20 12 Hopkins Hospital, and a year at the University of
09:00:23 13 Pennsylvania, and was then recruited to a position
09:00:27 14 as Assistant Professor of Psychiatry at Harvard
09:00:33 15 Medical School, where I was asked to be in charge of
09:00:38 16 a maximum security hospital for the criminally
09:00:42 17 insane, Forensic Section.

09:00:47 18 Q. What work did you do in that job?

09:00:49 19 A. For the two years that I was working at that
09:00:55 20 maximum security hospital, we had a very large
09:00:58 21 volume of pretrial defendants to evaluate. It was
09:01:03 22 about a thousand evaluations a year of competence to
09:01:07 23 stand trial and sanity with highly inadequate
09:01:11 24 resources.

09:01:12 25 I recruited some additional people

09:01:14 1 and we were able to do a somewhat better job. But
09:01:18 2 it was, um, very thin on resources, but lots of
09:01:23 3 experiences.

09:01:24 4 Q. But let me ask you, was there a time during
09:01:26 5 your Harvard tenure that you worked on a matter
09:01:29 6 where you had significantly more resources than you
09:01:32 7 just described?

09:01:35 8 A. An extraordinary change occurred two years into
09:01:38 9 that when in 19 -- I guess it was 1981 I was asked
09:01:50 10 to work on a particular case of the attempted
09:01:53 11 assassination of President Regan. And that took me
09:02:00 12 out of the realm of no sources, to being able to
09:02:01 13 spend nearly an entire year conducting a single
09:02:03 14 evaluation. I did research during that time and
09:02:06 15 wrote a book, too, but really it was the Hinckley
09:02:13 16 case I spent most of the year on.

09:02:14 17 Q. Can you give very brief overview where you went
09:02:17 18 after Harvard?

09:02:19 19 A. I was recruited to the University of Virginia,
09:02:24 20 half-time in the law school and half time in the med
09:02:28 21 school, and became a professor of law and a
09:02:30 22 professor of behavioral medicine and psychiatry, but
09:02:33 23 I'm not an attorney.

09:02:35 24 Q. Do you belong to any professional
09:02:38 25 organizations?

09:02:39 1 **A.** Yes.

09:02:40 2 **Q.** What -- can you just very briefly describe the
09:02:43 3 roles that you have in professional organizations?

09:02:46 4 **A.** Well, I belong to lots of them over the years,
09:02:49 5 but there are only three that I really participated
09:02:54 6 actively in. One was the American Academy of
09:02:56 7 Forensic Sciences, where I became the Chair of the
09:02:58 8 Forensic Psychiatry section, and opened it up to
09:03:03 9 psychologists as well so that it became the
09:03:05 10 Behavioral Science Section, or Psychiatry and
09:03:09 11 Psychology section. And I was somewhat involved in
09:03:13 12 the American Psychiatric Association. Chaired one
09:03:17 13 of the committees on misuse and abuse of psychiatry
09:03:21 14 in the US, and participated in the development of
09:03:24 15 two of the additions of the *Diagnostic and*
09:03:33 16 *Statistical Manual*.

09:03:33 17 And most important for me was the
09:03:35 18 American Academy of Psychiatry and the Law. And I
09:03:37 19 served many roles there, including president and
09:03:40 20 past president.

09:03:46 21 **Q.** Have you published on competence?

09:03:49 22 **A.** Yes.

09:03:49 23 **Q.** Have you lectured on it?

09:03:51 24 **A.** Yes.

09:03:54 25 **Q.** You said your group at Harvard did thousands of

09:03:57 1 evaluations, but do you have a ballpark of how many
09:03:59 2 competency evaluations you personally participated
09:04:01 3 in?

09:04:03 4 **A.** My estimate is that I participated in a
09:04:06 5 thousand of them, both at Harvard and Virginia.

09:04:12 6 **Q.** Now, in your work as a forensic psychiatrist,
09:04:18 7 has -- has malingering come up before?

09:04:21 8 **A.** Yes, often.

09:04:22 9 **Q.** Can you please describe the typical context
09:04:25 10 where it arises?

09:04:26 11 **A.** Well, most often in my practice it has arisen
09:04:32 12 in disability claims, which I used to do often. In
09:04:40 13 personal injury claims, in which the effort is to
09:04:44 14 exaggerate the degree of harm suffered in some
09:04:50 15 event, and in criminal cases where it's used to
09:04:53 16 evade responsibility or escape punishment.

09:04:58 17 **Q.** And focusing on, I guess, criminal cases more
09:05:04 18 broadly. Have you worked on significant criminal
09:05:06 19 cases over the course of your career?

09:05:10 20 **A.** Yes, I've been fortunate to do so.

09:05:12 21 **Q.** Did you work on the Jeffrey Dahmer case?

09:05:16 22 **A.** I did.

09:05:16 23 **Q.** Briefly, who is Jeffrey Dahmer?

09:05:20 24 **A.** He was a young man who was charged with 17, I
09:05:24 25 believe, homicides in Wisconsin. I might be

09:05:30 1 including one or two from Ohio as well. His was an
09:05:36 2 insanity defense case.

09:05:37 3 Q. Did you work on the Walter Moody case?

09:05:41 4 A. Yes.

09:05:41 5 Q. Very briefly, who is Walter Moody?

09:05:46 6 A. It was known as the VanPac case, and was a
09:05:52 7 lengthy investigation because he had set a series of
09:05:55 8 mail bombs it was eventually proved that killed
09:06:00 9 Judge Robert Vance of the Second Circuit Court of
09:06:03 10 Appeals and a civil rights lawyer or two.

09:06:08 11 And I worked with Louis Freeh in
09:06:15 12 that case.

09:06:15 13 Q. Ted Kaczynski case?

09:06:17 14 A. Yes, he was the Unabomber, and I was asked by
09:06:21 15 Justice to evaluate him. Never did get to meet him,
09:06:24 16 because he decided to change his plea to guilty the
09:06:27 17 day he was being ordered to meet with me.

09:06:30 18 Q. Andrea Yates?

09:06:32 19 A. That's the woman in Houston who had drowned her
09:06:36 20 five children in the bathtub.

09:06:38 21 Q. Was there a problem with that case?

09:06:39 22 A. There was.

09:06:40 23 Q. Can you please describe it for the Court?

09:06:47 24 A. During my cross-examination and testimony on
09:06:49 25 that case, I was asked a question about a television

09:06:52 1 show to which I consult. And I gave an answer from
09:06:57 2 memory, not having looked it up, and my answer was
09:07:01 3 factually wrong, incorrect.

09:07:03 4 I didn't discover that until
09:07:05 5 returning to California, and immediately offered to
09:07:10 6 return to correct the error. And there was a
09:07:13 7 sequence of fumbles thereafter, but it became a
09:07:18 8 centerpiece of her appeal. And the Texas Court of
09:07:26 9 Criminal Appeals overturned her conviction based on
09:07:29 10 the possibility that the jury had been misled by my
09:07:31 11 factual error and the Government's -- rather the
09:07:35 12 State's reliance on it in its closing argument.

09:07:38 13 Q. And just moving us a little more to recent
09:07:42 14 cases, who is Joe Caracanio (phonetic)?

09:07:49 15 A. This is the young man in Arizona who had killed
09:07:51 16 a federal judge and wounded Gabrielle Giffords and
09:07:59 17 others. I evaluated him also on behalf of the
09:08:03 18 Department of Justice, which decided to not pursue
09:08:07 19 death.

09:08:07 20 Q. Dr. Dietz, when you were describing that, were
09:08:10 21 you referring to Jared Loughner?

09:08:15 22 A. I thought that's what you said.

09:08:16 23 Q. I apologize. I don't remember what I said.
09:08:19 24 What you described was Jared Loughner?

09:08:22 25 A. Yes.

09:08:22 1 Q. What about the Boston marathon bombing case?

09:08:26 2 A. That's Dzhokhar Tsarnaev, one of the two
09:08:33 3 brothers -- the surviving brother who was brought to
09:08:34 4 trial. I was asked to evaluate him in connection
09:08:37 5 with capital sentencing. He refused to be examined.

09:08:42 6 I attended the entire sentencing
09:08:45 7 phase, and there was nothing to rebut because the
09:08:50 8 defense witnesses were dropped from the list. So I
09:08:53 9 flew home.

09:08:56 10 Q. Did you work on the Dylann Roof case?

09:08:58 11 A. I did.

09:08:59 12 Q. Quickly, who is that?

09:09:00 13 A. This is the young man in Charleston, South
09:09:06 14 Carolina who entered a historic and important church
09:09:12 15 and killed partitioners during a Bible studies
09:09:17 16 class. I was asked to evaluate him with respect to
09:09:25 17 sanity and did so, submitted a report which was
09:09:29 18 under seal. And subsequently, Mr. Roof fired his
09:09:35 19 counsel, represented himself, and my report was
09:09:39 20 never unsealed.

09:09:41 21 Q. Have you also worked on complex competency
09:09:44 22 cases before?

09:09:44 23 A. I have.

09:09:46 24 Q. Have courts qualified you as an expert in
09:09:49 25 forensic psychiatry before?

09:09:51 1 **A.** Yes.

09:09:51 2 **Q.** Fair to say all over the country?

09:09:53 3 **A.** Yes.

09:09:53 4 **Q.** Do you know about how many times you've
09:09:55 5 testified in criminal proceedings?

09:09:57 6 **A.** I've never added them up. If one counted the
09:10:02 7 early ones, it would be a very large number --
09:10:05 8 certainly hundreds.

09:10:06 9 **Q.** Okay.

09:10:07 10 MR. MAGNANI: The United States moves
09:10:08 11 to qualify Dr. Park Dietz as an expert in forensic
09:10:13 12 psychiatry.

09:10:13 13 MR. VARNADO: No objection, Your Honor.

09:10:14 14 THE COURT: He is so qualified.

09:10:20 15 MR. MAGNANI:

09:10:20 16 **Q.** Dr. Dietz did you write expert reports in this
09:10:22 17 case?

09:10:23 18 **A.** I did.

09:10:23 19 **Q.** How many expert reports did you write?

09:10:25 20 **A.** Three.

09:10:27 21 MR. MAGNANI: Court's indulgence?

09:10:29 22 THE COURT: Okay.

09:10:45 23 MR. MAGNANI: May I approach the
09:10:46 24 witness?

09:10:46 25 THE COURT: You may.

09:10:48 1 MR. MAGNANI: I'm just handing the
09:10:51 2 witness the report.

09:10:53 3 Q. Do you have your expert reports up there with
09:10:55 4 you?

09:10:56 5 A. I do.

09:10:56 6 Q. Okay. And just for the record again, I handed
09:10:59 7 the witness what's been admitted as Exhibits 83, 84
09:11:04 8 and 88?

09:11:06 9 THE COURT: Okay.

09:11:09 10 MR. MAGNANI:

09:11:09 11 Q. Dr. Dietz -- well, can you just -- I mean,
09:11:13 12 those are your reports?

09:11:15 13 A. Yes, they are.

09:11:15 14 Q. Hopefully we're not going to need them, but I
09:11:18 15 wanted to make sure that you had them. Of course,
09:11:20 16 let me know if you do. So I want to back up. Who
09:11:23 17 hired you in this case?

09:11:24 18 A. The Department of Justice, Tax Division.

09:11:31 19 Q. What were you hired to do?

09:11:34 20 A. To evaluate Mr. Brockman's competence to stand
09:11:37 21 trial.

09:11:37 22 Q. And can you describe your sort of -- well, did
09:11:41 23 you do that by yourself or with other doctors?

09:11:43 24 A. With other doctors.

09:11:44 25 Q. Can you just describe your role on the team of

09:11:47 1 doctors?

09:11:49 2 **A.** My role was as a forensic psychiatrist, and one
09:11:54 3 who was not an expert on dementia, or neuroimaging,
09:11:59 4 or even the elderly. Now, I've seen my share of the
09:12:04 5 elderly, but really to pay attention to the nature
09:12:08 6 of the evidence and to critically evaluate evidence
09:12:13 7 as it became available.

09:12:18 8 **Q.** How much were you paid for your work in this
09:12:20 9 case?

09:12:22 10 **A.** I had my office calculate the total before I
09:12:25 11 left for this travel, and at that point it had been
09:12:32 12 nearly \$200,000.

09:12:34 13 **Q.** Is that -- and was it ever unclear to you that
09:12:40 14 you were a government expert in this case?

09:12:43 15 **A.** No, not at all. I wasn't sure whether it was
09:12:47 16 the IRS or the Justice Department that had retained
09:12:51 17 me, but it was always clear it was the Government.

09:12:56 18 **Q.** Now, you wrote a declaration about that at one
09:12:58 19 point; right?

09:12:59 20 **A.** Yes.

09:12:59 21 **Q.** Now, you mentioned a lot of cases. I'm just
09:13:05 22 wondering, do you also sometimes work for accused
09:13:08 23 defendants?

09:13:08 24 **A.** Yes, of course.

09:13:09 25 **Q.** In criminal cases?

09:13:10 1 **A.** Yes.

09:13:11 2 **Q.** And could you describe -- what's the split?

09:13:19 3 How much work do you do for defense work versus

09:13:22 4 Government?

09:13:22 5 **A.** This is my career stage. Early on it was

09:13:26 6 mostly court-appointed work as a state employee.

09:13:31 7 Then -- that's in Boston -- or Massachusetts,

09:13:35 8 generally. Then it was mostly defense work at the

09:13:39 9 University of Virginia, because that's who referred

09:13:43 10 cases. And I had to struggle to get prosecution

09:13:48 11 cases to our clinic, but did.

09:13:51 12 Then in private practice it became

09:13:53 13 primarily government work for a time. And in recent

09:13:56 14 years, it's been 50/50.

09:13:58 15 **Q.** Working on both sides, have you ever rendered

09:14:02 16 opinions that were contrary to the theory of your

09:14:05 17 client's case?

09:14:06 18 **A.** Yes -- well, when working for the Government

09:14:11 19 I've rendered them even in court.

09:14:16 20 **Q.** Is there a difference between rendering a

09:14:22 21 contrary opinion when working for the Government

09:14:24 22 versus a criminal defendant?

09:14:25 23 **A.** Yes. In criminal matters, if the expert finds

09:14:29 24 contrary to the Government, the Government has a

09:14:35 25 duty under *Brady* to turn that over to the Defense.

09:14:40 1 In the context of working for the Defense, if the
09:14:43 2 Defense doesn't like my opinion at any point along
09:14:46 3 the way, um, they may not disclose me as testifying
09:14:52 4 expert. And they certainly have no duty to turn
09:14:55 5 over my opinions.

09:14:55 6 Q. Now, just -- you know, you billed a lot of time
09:15:00 7 -- do you bill by the hour?

09:15:01 8 A. Yes.

09:15:01 9 Q. And so, what did you do with all of those hours
09:15:05 10 in this case?

09:15:07 11 A. Initially, my task was advising Government
09:15:11 12 attorneys what records they should seek. Because
09:15:17 13 the records we want when there's a mental health
09:15:21 14 issue are very different from what a prosecutor
09:15:23 15 would normally want. Chief among those, of course,
09:15:28 16 is the medical records. But also in some cases
09:15:30 17 there are correctional records, and arrest records,
09:15:36 18 and probation records, and military records, and
09:15:39 19 much, much more education and business records and
09:15:43 20 so on.

09:15:44 21 Here, I wanted particularly to find
09:15:47 22 the medical records, and I advised the Government on
09:15:51 23 the importance of that.

09:15:52 24 Q. Do you remember about when you were retained by
09:15:55 25 the Government?

09:15:56 1 **A.** Um, the first phone call was in December of
09:15:59 2 2020. It took a little while for the paperwork to
09:16:03 3 get through. And before that had occurred, I was
09:16:07 4 asked to write a declaration supporting the need for
09:16:12 5 prior medical records.

09:16:13 6 **Q.** Is that declaration -- was that attached to the
09:16:15 7 Government's motion in this case?

09:16:18 8 **A.** It was.

09:16:21 9 **Q.** Do you know -- well, I'd like to pull up
09:16:24 10 Exhibit 81. Excuse me. I think we might need to
09:16:30 11 switch the laptop, please. I think we'll mostly be
09:16:32 12 working with the laptop.

09:16:37 13 Dr. Dietz, whenever it comes up, my
09:16:39 14 question is going to be -- well, let's wait until it
09:16:42 15 comes up on the screen, but my question will be, you
09:16:45 16 know, what is Government's 81? If there's a way to
09:16:50 17 sort of just zoom in -- I guess there's probably
09:16:53 18 not.

09:16:54 19 Can you recognize it from that
09:16:55 20 distance on your screen?

09:16:56 21 **A.** To some extent. It's very blurry.

09:16:59 22 **Q.** Maybe we can get through this a little faster.
09:17:02 23 Do you know if the Government had requested medical
09:17:05 24 records from the Defense in this case, prior to your
09:17:07 25 engagement?

09:17:08 1 **A.** Yes.

09:17:08 2 **Q.** Okay. Was that in November 2020?

09:17:13 3 **A.** Yes.

09:17:13 4 **Q.** That was before the Defense filed their motion
09:17:17 5 asking for those competency hearings?

09:17:19 6 **A.** Yes.

09:17:19 7 **Q.** Okay. So when you were first -- actually, can
09:17:23 8 we scroll? Is it possible to scroll in this? I'm
09:17:33 9 sorry. Now that I can see on the zoom, can you
09:17:36 10 please go to the first page again?

09:17:38 11 So is Exhibit 81 -- is this a letter
09:17:41 12 from the defense team to the prosecution team of
09:17:45 13 April 2020?

09:17:46 14 **A.** Yes, it is.

09:17:47 15 **Q.** Now, this exhibit -- and I'll just represent,
09:17:50 16 if it's not a problem -- does not have any
09:17:52 17 attachments to it. But, Dr. Dietz, do you recall if
09:17:55 18 there were attachments submitted with this letter of
09:17:59 19 medical records?

09:17:59 20 **A.** Yes, there were.

09:18:00 21 **Q.** And were the medical records attached to this
09:18:04 22 letter the same medical records that were filed with
09:18:06 23 the Defense's first motion asking for this hearing?

09:18:15 24 **A.** That I don't know.

09:18:16 25 **MR. MAGNANI:** Okay. I'll move to admit

09:18:18 1 81 in evidence if it's not.

09:18:21 2 MR. VARNADO: No objection.

09:18:21 3 THE COURT: Without objection,

09:18:25 4 Exhibit 81 is admitted.

09:18:28 5 MR. MAGNANI: Excuse me.

09:18:29 6 Q. Now I want to go to 80. Now I apologize for
09:18:32 7 the confusion. This is maybe what I was asking you
09:18:34 8 about before. Is Exhibit 80 the Government's
09:18:38 9 November 2020 request for records?

09:18:40 10 A. It is.

09:18:41 11 MR. MAGNANI: I'll move to admit this,
09:18:43 12 too, please.

09:18:43 13 MR. VARNADO: No objection.

09:18:44 14 THE COURT: Without objection, 80 is
09:18:45 15 admitted.

09:18:46 16 MR. MAGNANI:

09:18:46 17 Q. Do you recognize -- can we zoom in on the
09:18:49 18 bullet-pointed section here, and to the bottom? Do
09:18:52 19 you recognize the names of these doctors that are
09:18:55 20 listed in the Government's request for records?

09:18:58 21 A. I do.

09:18:59 22 Q. Well, what -- who are those doctors?

09:19:04 23 A. Well --

09:19:06 24 Q. Well, you know, I can probably move this along.
09:19:11 25 Are those -- are those the Baylor doctors that --

09:19:16 1 whose records were attached to the letter that the
09:19:19 2 Defense sent to the Government?

09:19:21 3 **A.** That would be one way to put it, yes. Some
09:19:26 4 were treating doctors at various stages. One was a
09:19:34 5 very long-term friend and more.

09:19:38 6 **Q.** And do you know -- do you know if the
09:19:42 7 Government got medical -- the medical records
09:19:44 8 requested?

09:19:46 9 **A.** Not at that time.

09:19:47 10 **Q.** Okay. Did you do an exam -- or let's start --
09:19:52 11 when was the first exam done by any member of the
09:19:55 12 prosecution team in this case?

09:19:56 13 **A.** May 2021.

09:19:59 14 **Q.** And -- well, let me ask you this. Do you know
09:20:03 15 about when Dr. Darby did an exam of the Defendant?

09:20:08 16 **A.** Dr. Darby did an exam in early May, 2021.

09:20:12 17 **Q.** Before Dr. Darby did the exam in early
09:20:15 18 May 2021 -- excuse me -- can you describe what the
09:20:18 19 state of medical records was that the team had
09:20:20 20 access to at that time?

09:20:21 21 **A.** Yes. Despite having requested all of the
09:20:26 22 medical records and litigated the issue, we had
09:20:31 23 records from Fondren Orthopedics that consisted of
09:20:40 24 X-rays of a fracture. We had records from a
09:20:44 25 dermatologist that were not contributory, other than

09:20:48 1 to show Mr. Brockman had earlier been signing
09:20:52 2 consent forms.

09:20:53 3 Q. Well, and -- sorry.

09:20:54 4 A. And we had some other not very useful
09:21:09 5 information.

09:21:10 6 Q. And let me just ask you this. After
09:21:14 7 Dr. Darby's exam, did you get some additional
09:21:16 8 records?

09:21:16 9 A. Yes.

09:21:16 10 Q. What were those records?

09:21:17 11 A. Those were the records that Mr. Brockman had
09:21:20 12 stored at his home, including --

09:21:25 13 Q. Oh.

09:21:26 14 THE WITNESS: Thank you.

09:21:27 15 MR. MAGNANI: I don't pick up on cues
09:21:29 16 so well. Sorry about that.

09:21:31 17 THE WITNESS: Including Dr. Obenour's
09:21:35 18 case records.

09:21:35 19 MR. MAGNANI:

09:21:35 20 Q. Whenever you are ready, sorry. How did you
09:21:40 21 find out about those records?

09:21:43 22 A. We only learned of Dr. Obenour by virtue of
09:21:49 23 Mr. Brockman's having mentioned that when his GP
09:21:52 24 retired, he negotiated receipt of the records from
09:21:57 25 his file.

09:21:59 1 Q. And not to sort of rehash everything -- I know
09:22:01 2 you wrote a declaration on this -- but just briefly
09:22:04 3 -- I mean, why is it important to have historical
09:22:11 4 medical records before you examine a subject?

09:22:15 5 A. Well, in forensic work it's important because
09:22:18 6 we don't know what to ask, or the -- what the basic
09:22:22 7 problems are if we don't have the records in
09:22:25 8 advance. And one can't gauge, necessarily, the
09:22:28 9 accuracy of what a defendant is saying without being
09:22:32 10 armed with objective data from other sources prior
09:22:38 11 to the interview.

09:22:39 12 Q. Actually, Doctor, can you also just -- I mean,
09:22:42 13 briefly describe the difference between -- like,
09:22:45 14 your forensic practice and common clinical practice?

09:22:47 15 A. Sorry. In clinical practice, one is pushed for
09:23:04 16 time, needs to be efficient, tries to focus on the
09:23:07 17 most important things. In general, one believes
09:23:10 18 what one's patient and their family members are
09:23:13 19 saying. If any prior records are received, it's
09:23:17 20 common just to read the discharge summaries from
09:23:21 21 hospitalization or the highlighted parts of an
09:23:27 22 electronic record. Because no one would have time
09:23:31 23 to review all of the detailed records over the
09:23:34 24 course of a long life.

09:23:36 25 In forensic work, one has to look

09:23:39 1 at everything -- the nursing notes, the drugs
09:23:41 2 administered -- every little detail, getting help in
09:23:45 3 translating them in need be. That's a very
09:23:48 4 laborious task.

09:23:49 5 And while we didn't have the
09:23:52 6 significant medical records prior to the May
09:23:56 7 examinations, we would later receive thousands and
09:23:59 8 thousands of pages of medical records of many kinds.
09:24:04 9 They continued to dribble in until perhaps two weeks
09:24:09 10 ago.

09:24:09 11 Q. And -- and fair to say you were not rushed for
09:24:12 12 time in reviewing those?

09:24:15 13 A. For the lengthy ones, we were not rushed for
09:24:18 14 time. We had some months. For the most recent ones
09:24:25 15 there was some rush.

09:24:26 16 Q. But overall, you figure you had the resources
09:24:30 17 to take the time to do the appropriate job from a
09:24:33 18 forensic standpoint?

09:24:35 19 A. Yes.

09:24:35 20 Q. The bills prove it?

09:24:36 21 A. Yes.

09:24:37 22 Q. I'll just note, Defense counsel very generously
09:24:40 23 offered a cough drop if you would like it. Are you
09:24:44 24 interested?

09:24:45 25 A. Happy to try it. Thank you.

09:24:56 1 Q. Okay. So besides access to records, is it also
09:25:00 2 important to have access to people?

09:25:04 3 A. Yes, it is.

09:25:06 4 Q. Oh, actually before I move on. Did you prepare
09:25:09 5 a -- a slide deck to assist in your presentation
09:25:14 6 today?

09:25:14 7 A. I did, since grudgingly converting to the
09:25:17 8 digital world I've used PowerPoint every time I
09:25:21 9 testify.

09:25:22 10 Q. And actually, can we pull up that deck? Now,
09:25:31 11 were you talking about your access to -- collateral
09:25:34 12 people I think you said. What's a collateral
09:25:37 13 source?

09:25:37 14 A. Collateral sources are anything other than the
09:25:40 15 person being evaluated, and that includes collateral
09:25:45 16 documents, collateral witnesses and more.

09:25:49 17 Q. Did you have adequate access to collateral
09:25:51 18 sources in this case?

09:25:59 19 A. For a period of time there was substantial
09:26:01 20 collateral evidence by way of documents, videotapes
09:26:05 21 and -- at least medical records.

09:26:13 22 Q. I asked too broad of a question. I asked
09:26:16 23 collateral sources. Can I ask about collateral
09:26:20 24 interviews?

09:26:20 25 A. With respect to collateral interviews, there

09:26:23 1 were significant limitations.

09:26:27 2 Q. Do you have the clicker to drive?

09:26:29 3 A. I do.

09:26:30 4 Q. Okay. If you could just tell us, you know
09:26:35 5 about -- who did you have access to and who did you
09:26:38 6 not have access to?

09:26:40 7 A. Sure.

09:26:42 8 MR. VARNADO: Your Honor, can I ask
09:26:43 9 Counsel for a copy of the slide deck? We don't have
09:26:46 10 it, so...

09:26:47 11 MR. MAGNANI: Sorry, I didn't have it
09:26:49 12 -- the list.

09:26:49 13 THE COURT: Can I get a copy as well,
09:26:51 14 Counsel?

09:26:52 15 MR. MAGNANI: Of course.

09:27:07 16 MR. VARNADO: I'll note for the record,
09:27:08 17 this looks to be about a 20- to 30-page slide deck
09:27:12 18 I've never seen before. Just receiving it right
09:27:14 19 now.

09:27:14 20 THE COURT: Okay.

09:27:16 21 MR. MAGNANI: I think it's longer than
09:27:17 22 that, Your Honor, I hate to say.

09:27:19 23 THE COURT: Not a problem.

09:27:20 24 MR. MAGNANI:

09:27:20 25 Q. And so -- sorry, Dr. Dietz. Can you just

09:27:29 1 describe your efforts to collect witness interviews
09:27:33 2 in this case?

09:27:34 3 **A.** Yes, well Mrs. Brockman was interviewed by
09:27:39 4 Dr. Darby. Ms. Keneally was interviewed by
09:27:42 5 Dr. Denney, and so was Mr. Romatowski. However, we
09:27:47 6 had problems with obtaining interviews with other
09:27:52 7 people we had asked to interview who were reluctant
09:27:57 8 or refused. Dr. Yudofsky refused through counsel.

09:28:02 9 I was told to call his attorney,
09:28:04 10 rather than to call him directly. I did so and was
09:28:08 11 told that I should not call Dr. Yudofsky, that there
09:28:17 12 were discussions about offering him immunity and I
09:28:19 13 was not to approach him directly, and of course I
09:28:22 14 didn't. Dr. Denney and I asked to interview Dorothy
09:28:35 15 Brockman when we were examining Mr. Brockman in May.
09:28:37 16 I forget exactly the sequence of communications
09:28:40 17 there, but we were told that she had already given
09:28:43 18 an interview and would not consent to meet with us.

09:28:51 19 I was told that Don Passmore,
09:28:55 20 Mr. Brockman's CPA had refused to speak to
09:28:58 21 government agents or experts through counsel. I was
09:29:02 22 told the same thing about Craig Moss. I was told
09:29:08 23 the same thing about Robert Burnett. I was told the
09:29:11 24 same thing about Rob Nalley. I was told that Laura
09:29:19 25 Douglas's attorney had said he'd considered it, but

09:29:22 1 never followed up.

09:29:24 2 I personally tried several times
09:29:27 3 calling Paul and Isabelita Sheehan, who were
09:29:37 4 caretakers of the Brockman home and the larger home
09:29:40 5 they moved out of in February of this year, and
09:29:42 6 never received an answer. There was a message
09:29:46 7 saying the voicemail box had not been set up.

09:29:49 8 I called Larry Perry, who is
09:29:52 9 Mr. Brockman's barber. And he's a very nice
09:29:55 10 gentleman. Had a conversation that he said he
09:29:58 11 doesn't speak about his clients and wasn't going to
09:30:00 12 talk to me about Mr. Brockman.

09:30:07 13 I called Donna Ball, Mr. Brockman's
09:30:11 14 longtime secretary who was also very nice and said
09:30:14 15 that she'd consider it and call back later. I
09:30:20 16 called her back, and she said that she had spoken to
09:30:23 17 her attorney and wasn't going to be comfortable
09:30:27 18 speaking. And I said that I hadn't known she was
09:30:31 19 represented or I wouldn't have called her directly.
09:30:34 20 That was the end of that contact.

09:30:36 21 Q. Just generally, you talked about who some of
09:30:38 22 the people were, but can you just describe why you
09:30:41 23 were trying to contact these people?

09:30:43 24 A. To see if they had observations bearing on
09:30:46 25 Mr. Brockman's mental state, particularly his

09:30:50 1 cognitive abilities longitudinally over the years.
09:30:54 2 These were people who I thought were well placed to
09:30:57 3 see his cognitive functioning and to observe what
09:31:03 4 decline may or may not have occurred.

09:31:05 5 Usually collateral witnesses of
09:31:08 6 this sort would be able to give examples that would
09:31:12 7 inform my decision making.

09:31:15 8 **Q.** Is that just because it's important to have
09:31:18 9 access to the people that see an accused person in
09:31:22 10 their daily life?

09:31:24 11 **A.** I would put it more broadly. It's important to
09:31:27 12 have multiple sources of data so that they can be
09:31:30 13 compared with one another. And one important source
09:31:33 14 of data is the people who have daily and ongoing
09:31:38 15 contact with a defendant.

09:31:42 16 **Q.** Dr. Dietz, at the this time I want to move -- I
09:31:44 17 want to try to narrow the issues here. Can you
09:31:48 18 just, you know, frame the dispute for the Court?
09:31:50 19 Like, can you tell us what -- what's in agreement in
09:31:53 20 this case?

09:31:53 21 **A.** My perception -- and of course others may see
09:31:57 22 it differently -- is that there are several areas of
09:32:02 23 agreement. First, Mr. Brockman spent his adult life
09:32:05 24 as a hard working businessman and executive who
09:32:09 25 built a successful business.

09:32:11 1 Second, that he has got Parkinson's
09:32:14 2 disease. No one disputes Parkinson's disease. And
09:32:20 3 there are demonstrable brain changes, not just the
09:32:23 4 ones that prove Parkinson's disease. And are --
09:32:29 5 there's some degree of cognitive decline. I believe
09:32:32 6 all of the experts agree to those points. I think
09:32:38 7 also everyone agrees -- well, the experts do -- that
09:32:44 8 Mr. Brockman's cognitive decline is progressive and
09:32:51 9 is irreversible. He's not going to get better from
09:32:57 10 whatever degree of cognitive decline he currently
09:33:00 11 has.

09:33:01 12 Lastly, I think the experts all
09:33:03 13 agree that Mr. Brockman physically frail, and some
09:33:08 14 of that is from his Parkinson's disease. And so,
09:33:16 15 one can observe physical frailty and manifestations
09:33:20 16 thereof. He is a fall risk because of his posture,
09:33:25 17 his balance, and a history of falls -- and his age
09:33:29 18 in general. And everyone agrees that he needs
09:33:32 19 assistance with mobility and daily activities.

09:33:36 20 And that can all be accounted for
09:33:40 21 by Parkinson's motor symptoms. So that physical
09:33:46 22 frailty does not inform us about his cognition, and
09:33:56 23 that can be misleading to us. Because the fact that
09:34:02 24 he looks physically frail implies there might be
09:34:06 25 mental frailty as well, but the truth on that is

09:34:08 1 that there may or may not be mental frailty in a
09:34:13 2 physically frail person.

09:34:15 3 He is at least physically frail.

09:34:18 4 Q. And how would you describe the points of
09:34:20 5 contention or disagreement between the experts in
09:34:23 6 this case?

09:34:24 7 A. I think they are few in number, but very
09:34:28 8 important. First, whether he is competent to stand
09:34:31 9 trial. And two subcomponents of that that are
09:34:37 10 really underlying the disagreement about competence,
09:34:41 11 the first of those is the extent of his cognitive
09:34:45 12 impairment. There's not agreement on how impaired
09:34:50 13 Mr. Brockman is cognitively.

09:34:53 14 Second, whether he is malingering,
09:34:56 15 that is exaggerating the degree of cognitive
09:35:00 16 impairment, this is the basis of the differing
09:35:04 17 opinions on competence.

09:35:14 18 Q. And in terms of how we talk about cognitive
09:35:19 19 impairment. Is it fair to say the defense experts
09:35:22 20 are using different -- well, substantively different
09:35:26 21 terminology --

09:35:27 22 MR. VARNADO: Object to leading.

09:35:29 23 THE COURT: Objection overruled.

09:35:33 24 THE WITNESS: I think -- I think
09:35:39 25 there's room for vagueness, uncertainty, and

09:35:43 1 different uses of terminology within the field as a
09:35:46 2 whole. And that some of the terminology used in the
09:35:53 3 case can be misleading or confusing.

09:35:57 4 Q. I mean, what is your opinion about these areas
09:35:59 5 of disagreement? As a forensic psychiatrist, what's
09:36:07 6 your take on the disagreements here?

09:36:09 7 A. Well, I can give my opinions about these
09:36:12 8 contested issues. The first of those is that I
09:36:17 9 believe that Mr. Brockman does meet the *Dusky*
09:36:22 10 standard for competence to stand trial, has each of
09:36:29 11 the ingredients necessary to be found competent.
09:36:32 12 That is that he has a reasonable degree of rational
09:36:35 13 understanding and rational and factual understanding
09:36:41 14 of the proceedings against him, and that he is able
09:36:43 15 to consult with his attorney.

09:36:44 16 Q. And how is your -- how does malingering factor
09:36:51 17 into that opinion?

09:36:57 18 A. It's my belief Mr. Brockman's ability to do
09:37:00 19 this is masked by the exaggeration of his symptom
09:37:05 20 severity, and that he is capable fooling others or
09:37:15 21 duping others into believing his impairment is more
09:37:19 22 severe than it is.

09:37:20 23 Q. When do you think that started?

09:37:27 24 A. It started quite early. And as we go through
09:37:32 25 the different sources of information, I think it

09:37:36 1 will become clearer, at which points which kinds of
09:37:41 2 exaggeration were occurring. One point at which
09:37:45 3 we've got very clear evidence of it is in Dr. York's
09:37:51 4 first examination in March of 2019.

09:37:55 5 Q. Now, can you just describe, generally, how
09:37:59 6 exaggeration or malingering impacts the ability to
09:38:03 7 accurately measure the degree of cognitive
09:38:06 8 impairment?

09:38:12 9 A. With respect to the kind of malingering
09:38:17 10 observed here, testing batteries that would normally
09:38:24 11 measure cognitive impairment are invalidated, and
09:38:30 12 therefore can't be relied on at all for anything.
09:38:40 13 An invalid battery of neuropsychological testing
09:38:43 14 tells us we can't rely on any of the results of that
09:38:46 15 testing.

09:38:49 16 Q. And do you know if Mr. Brockman's diagnoses by
09:38:52 17 other doctors have relied on that type of testing?

09:38:56 18 A. Yes, I know that at least Dr. Agronin,
09:39:01 19 Dr. Guilmette, and Dr. Wisniewski relied on testing
09:39:07 20 that in my view was not valid.

09:39:10 21 Q. And just back to -- zooming out to cognitive
09:39:13 22 function. I mean, what is your opinion on where
09:39:17 23 Mr. Brockman falls on the normal cognitive function
09:39:20 24 to severe dementia scale?

09:39:22 25 A. Where he actually falls, in my opinion, is at

09:39:27 1 the mild cognitive impairment stage, or perhaps at
09:39:37 2 the stage of mild dementia.

09:39:41 3 Q. I wanted -- I think you already talked about
09:39:44 4 having had the opportunity to examine Mr. Brockman.
09:39:48 5 I just want to ask you -- directing your attention
09:39:52 6 to the May 18th exam, did you have the chance to
09:39:55 7 just learn about this man?

09:39:56 8 A. Yes.

09:39:57 9 Q. And so -- I mean, what can you -- you know,
09:40:00 10 we've had a lot of witnesses here. But what can you
09:40:02 11 tell us about this man that you interviewed?

09:40:05 12 A. Well, first of all this is a man that it's hard
09:40:10 13 not to admire. He really had spectacular
09:40:16 14 achievement. He came from a life he regarded as
09:40:22 15 working poor, and had enormous contact with a
09:40:26 16 grandmother who taught him all sorts of values. She
09:40:31 17 taught him hard work. She taught him to save for
09:40:40 18 the future.

09:40:41 19 She instilled in him, through lots
09:40:43 20 of contact, a set of values that I happen to admire
09:40:48 21 greatly. And he credits her with much of the
09:40:57 22 success, because of the values she instilled in him.
09:41:06 23 He was able to receive an education because his
09:41:08 24 grandmother had paid his complete tuition, and room
09:41:11 25 and board with money she had accumulated by buying

09:41:15 1 properties around her home and saving well.

09:41:20 2 And Mr. Brockman had all manner of
09:41:22 3 jobs from the time his grandma made him be a
09:41:26 4 paperboy through college, and later when he was
09:41:32 5 picking up and delivering laundry. He gave a
09:41:42 6 colorful description of all of these jobs and how
09:41:44 7 they taught him all various things.

09:41:46 8 Q. You talked about jobs he had when he was a --
09:41:49 9 you know, a younger boy or man. Can you talk a
09:41:52 10 little bit about his professional career?

09:41:55 11 A. Well, he worked for two other employers when he
09:41:59 12 joined the real working world full-time. The first
09:42:04 13 was Ford Motor Company. He described his experience
09:42:09 14 there as less than illuminating. And then he worked
09:42:19 15 for IBM, where he learned a very great deal. But he
09:42:23 16 saw how some things could be done better than IBM
09:42:27 17 was doing them, and decided that he wanted to start
09:42:29 18 his own company.

09:42:35 19 He gave me a vivid description of
09:42:38 20 how Dorothy, his wife, had supported his idea of
09:42:42 21 taking this risky step of starting his own company.
09:42:49 22 And it was started in the living room of their home.
09:42:55 23 And from nothing, he built what would later become
09:43:01 24 the set of companies that included Reynolds and
09:43:08 25 Reynolds. And that's kind of an American dream

09:43:11 1 story to go from -- not exactly rags, but working
09:43:16 2 poor to riches with a successful business employing
09:43:20 3 lots of people.

09:43:23 4 He even taught himself to program.
09:43:26 5 It's not that he went to school to learn to program.
09:43:30 6 He taught himself to do it. And for the head of a
09:43:33 7 software company to have done that is another -- in
09:43:35 8 my view -- admirable achievement. So it ensured he
09:43:43 9 had an enormously successful business career, and
09:43:47 10 also engaged in significant philanthropy through the
09:43:53 11 A. Eugene Brockman Charitable Trust.

09:43:55 12 On the first day of the May
09:43:57 13 interview, he was able to give, from memory, a list
09:44:00 14 of the various charities to which the trust had
09:44:02 15 contributed, and he gave detail about what some of
09:44:11 16 those charities had accomplished by way of
09:44:13 17 scholarships, the opera hall and so on.

09:44:15 18 He happened not to mention Baylor
09:44:18 19 Medical College in that list on the first day. And
09:44:22 20 on the second day he was asked to talk about any
09:44:28 21 additional charities he thought of, and again to
09:44:31 22 mention Baylor.

09:44:32 23 And on the third day in May when I
09:44:35 24 asked him about Baylor by bringing up the name he
09:44:41 25 said, "Yes, there'd been something there. It's hard

09:44:44 1 to remember them all."

09:44:47 2 But he said he thought it was
09:44:50 3 around a million dollars that he donated to Baylor,
09:44:53 4 when I knew that it was \$25 million. And I asked
09:44:56 5 him if it could have been closer to 30, and he said
09:44:59 6 that that number was too high.

09:45:03 7 Q. And just -- I mean, any -- did he discuss any
09:45:06 8 sort of personal interests --

09:45:08 9 A. Oh, yes.

09:45:09 10 Q. -- besides his business career? Can you talk
09:45:12 11 about those?

09:45:13 12 A. So he talked about his fisher -- his fishing
09:45:16 13 expeditions. He's an avid fisherman, even had a
09:45:20 14 collection of fishing reels. And this had been a
09:45:25 15 longstanding interest. He also was a shooter and a
09:45:30 16 bird hunter. We talked about some of the weapons
09:45:32 17 that he owned and his enjoyment of them, which
09:45:35 18 was -- he gave a story about how he was able to have
09:45:42 19 a New England manufacturer make a customized 1911
09:45:51 20 pistol with the serial number being his name.

09:45:56 21 So he -- he knew his stuff about
09:46:00 22 his hobbies, and was enthusiastic about speaking
09:46:06 23 about them. I learned that he was widely traveled,
09:46:08 24 including many trips for fishing and shooting
09:46:14 25 purposes. I learned, of course, and had already

09:46:20 1 known that he had retired a year previously as CEO
09:46:27 2 and chair of Reynolds and Reynolds. But when I
09:46:35 3 asked him if he had exercised a disability clause,
09:46:38 4 he said that he hadn't, and of course I knew that he
09:46:46 5 was an 80-year-old man.

09:46:49 6 He had been married for 53 years,
09:46:51 7 and that his family, to whom he was particularly
09:46:57 8 close, included not only his wife Dorothy, but also
09:47:00 9 his son Robert and his daughter-in-law, and their --
09:47:10 10 at the time -- infant child.

09:47:11 11 Q. Did you also learn about Mr. Brockman's medical
09:47:14 12 history throughout your work in this case?

09:47:18 13 A. Yes.

09:47:18 14 Q. Can you please just summarize the relevant
09:47:21 15 medical history?

09:47:21 16 A. So it's a very long medical history with many,
09:47:25 17 many detailed records, but the relevant portion is
09:47:32 18 that he first developed depression in recent years,
09:47:39 19 and that depression was attributed by -- was
09:47:43 20 attributed to different causes by various people.

09:47:51 21 Q. I mean, do you -- can you talk -- can you
09:47:56 22 describe that a little more, please?

09:47:57 23 A. I don't think the cause of it is all that
09:48:01 24 important here, because there are multiple possible
09:48:03 25 causes. It could have been related to the early

09:48:06 1 onset of Parkinson's. It could have been related to
09:48:12 2 his recognition of the jeopardy he was in from
09:48:15 3 ongoing investigations.

09:48:17 4 It could have been related to loss
09:48:23 5 of some functions that are difficult for men of his
09:48:28 6 age. So there are multiple, possible cause of it.
09:48:33 7 But it's clear that there was some depression, and
09:48:37 8 that he was treated quite promptly with Wellbutrin,
09:48:43 9 an anti-depressant. And that most of the time that
09:48:46 10 has worked adequately, he calls them happy pills.

09:48:52 11 Q. And if you are not that's okay, but are you
09:48:55 12 able to estimate about when he started being treated
09:48:57 13 for depression?

09:49:01 14 A. I think it was -- I'm sorry?

09:49:03 15 Q. I mean, if you are.

09:49:06 16 A. I didn't make note of it, but I think it is
09:49:09 17 around October of 2018 that he is speaking --

09:49:23 18 Q. If you are not sure.

09:49:24 19 A. Yeah, I'm not sure.

09:49:25 20 Q. Okay. Well, we already talked about
09:49:33 21 Parkinson's, but what other relevant history did you
09:49:36 22 consider?

09:49:36 23 A. Parkinson's disease, of course, was an
09:49:39 24 important part. That's managed with medication.
09:49:46 25 The dose has been tweaked at various points along

09:49:50 1 the way to make sure it was not producing side
09:49:53 2 effects, but he's been on a stable dose for some
09:49:58 3 time.

09:49:58 4 There was the discovery through a
09:50:02 5 request from defense experts for the beta-amyloid
09:50:09 6 study. And the beta-amyloid study doesn't actually
09:50:14 7 tell us much since an 80-year-old is likely to be
09:50:20 8 positive for beta-amyloid.

09:50:23 9 And it's consistent with perfectly
09:50:26 10 normal cognition, or also consistent with problems
09:50:31 11 with cognition. So it's not informative about his
09:50:37 12 cognitive function at any point in time.

09:50:40 13 Q. Is there another protein that gets deposited in
09:50:43 14 the brain that can be more informative about
09:50:49 15 Alzheimer's disease?

09:50:50 16 A. Yes, tau. T-A-U -- MR. VARNADO: Your Honor,
09:50:54 17 I'd object. This is not in his report and not his
09:50:57 18 area of expertise. He's just regurgitating what
09:51:01 19 other people have testified in this court.

09:51:02 20 THE COURT: But he has worked on a team
09:51:04 21 and looked at other experts' opinions; right,
09:51:07 22 Counsel?

09:51:09 23 MR. MAGNANI: Yes, Your Honor. But
09:51:10 24 also to be clear, I'm hoping to work with this
09:51:12 25 witness to clarify some things that -- maybe

09:51:15 1 testimony that didn't come out in the course of this
09:51:17 2 hearing. And so if -- if that's helpful for the
09:51:19 3 Court, I think it's appropriate for this witness to
09:51:23 4 do that. But happy to hear it if it's not.

09:51:26 5 MR. VARNADO: He testified at the
09:51:27 6 beginning, Your Honor, he's not an expert in
09:51:30 7 dementia, neuroimaging, or even in the elderly. So
09:51:33 8 having sat through regurgitate the opening is not
09:51:39 9 appropriate.

09:51:39 10 THE COURT: Objection's overruled. You
09:51:40 11 can deal with it on cross-examination.
09:51:43 12 Respectfully, I'll let you continue.

09:51:44 13 MR. MAGNANI:

09:51:45 14 Q. I apologize. If you remember where you were,
09:51:47 15 you can pick it up from there. But if you don't,
09:51:49 16 um, really the question is I wanted to know about if
09:51:51 17 there was another protein that deposits in the brain
09:51:56 18 after beta-amyloid that's informative about
09:52:02 19 Alzheimer's disease.

09:52:03 20 A. Yes, and I answered tau, T-A-U.

09:52:06 21 Q. Do you know if tau -- the levels of tau can be
09:52:09 22 tested in a person?

09:52:10 23 A. Yes, there are two ways to test it. One is
09:52:14 24 with another radioactive tracer test, that is an FMG
09:52:22 25 -- I'm sorry, a PET looking specifically for this

09:52:26 1 protein.

09:52:26 2 The other is from the cerebrospinal
09:52:31 3 fluid, which requires a spinal tap. So most people
09:52:34 4 would rather have the scan.

09:52:37 5 Q. Do you know if there was any test of the levels
09:52:40 6 of tau in Mr. Brockman in this case?

09:52:42 7 A. This was not done.

09:52:49 8 Q. Can you think of any reason -- I mean, you
09:52:49 9 worked at a forensic psychiatrist on both sides.
09:52:53 10 Can you think about a reason why the Defense's
09:52:55 11 experts may have ordered an amyloid and not tau PET?

09:52:59 12 A. Well, there's no downside risk to the Defense
09:53:02 13 ordering an amyloid, because if it's negative that
09:53:08 14 just means that the cause of any alleged dementia is
09:53:14 15 probably not Alzheimer's disease. But if it's
09:53:20 16 present, then it's possible there's Alzheimer's
09:53:26 17 disease. It's not going to say how far that disease
09:53:30 18 has progressed. The amyloid doesn't really inform
09:53:35 19 as to that.

09:53:38 20 On the other hand, the measurement
09:53:40 21 of tau has the risk that it won't be there, which
09:53:52 22 would limit the ability to use Alzheimer's disease
09:53:59 23 as the explanation for cognitive decline. So the
09:54:03 24 safer one was done as a tactical matter, or for
09:54:11 25 trial strategy.

09:54:13 1 Q. And what -- just get back to the medical
09:54:18 2 history. What, from your review of records, have
09:54:21 3 you been able to see about the Defendant's level of
09:54:24 4 cognitive impairment?

09:54:25 5 A. Well, that's pretty interesting. That's
09:54:28 6 disputed. And it depends on who is looking when
09:54:37 7 what's seen as to the level of cognitive impairment.
09:54:42 8 As a topic we'll have to come back to, because
09:54:45 9 that's the central dispute.

09:54:46 10 Q. Um, can you describe -- well, was a sleep study
09:54:52 11 ordered by the Government team in this case?

09:54:53 12 A. Yes.

09:54:54 13 Q. Can you describe why the Government asked for a
09:54:58 14 sleep study?

09:54:58 15 A. The reason for the sleep study originally was
09:55:02 16 that there'd been a suggestion in clinical records
09:55:08 17 that there might be Lewy bodies dementia. That was
09:55:16 18 raised as an issue because of some instances in
09:55:19 19 which Mr. Brockman had been told by his wife that he
09:55:23 20 was moving during sleep.

09:55:28 21 That creates the possibility that
09:55:31 22 he's acting out his dreams, which can happen with
09:55:35 23 Lewy bodies dementia. It's known as an REM sleep
09:55:40 24 movement disorder. The way one verifies whether
09:55:44 25 it's actually present is by using some of the leads

09:55:54 1 of an EEG -- brainwaves -- while the person is
09:56:00 2 sleeping in the lab and while they're being
09:56:02 3 videotaped. So one can verify are they in REM sleep
09:56:07 4 from the EEG, at the same time that one can see
09:56:11 5 their movements through the video. So that's the
09:56:16 6 gold standard for seeing if there's an REM movement
09:56:21 7 sleep disorder.

09:56:22 8 The first test done of that didn't
09:56:27 9 result in a sufficient duration of REM sleep to be
09:56:31 10 able to say whether he had that disorder. So it
09:56:37 11 doesn't rule it out that it was not observed in an
09:56:42 12 inadequately small sample. But what was observed,
09:56:46 13 despite the short length of REM sleep, was that he
09:56:52 14 had obstructive sleep apnea. Now, this is a chronic
09:56:59 15 condition that causes the person to become alert to
09:57:03 16 varying degrees, or for the brain to begin to show
09:57:07 17 signs of arousal and a decrease in the amount of
09:57:12 18 restorative sleep.

09:57:17 19 And there are cutoff points used by
09:57:22 20 sleep specialists for how many of these arousal
09:57:25 21 episodes per hour constitute severe-enough
09:57:32 22 obstructive sleep apnea to impair a person's
09:57:39 23 functions in various ways, or increase risk of cardiac
09:57:45 24 events resulting in death. So it's a significant
09:57:48 25 concern if someone is having 70 arousals an hour and

09:57:53 1 not getting sufficient rest.

09:57:55 2 And among the problems that can
09:57:57 3 occur are those affecting cognitive function. So
09:58:05 4 that was picked up on the very first sleep study.
09:58:12 5 And the second sleep study titrated --

09:58:16 6 Q. Actually, Dr. Dietz, before you move on to the
09:58:18 7 second study. You mentioned that the study was
09:58:22 8 ordered to try to measure whether the Defendant was
09:58:24 9 having a telltale symptom of dementia with Lewy
09:58:28 10 bodies. I want to just ask, do you know if any of
09:58:31 11 the doctors at Baylor who diagnosed dementia with
09:58:34 12 Lewy bodies -- if they had ordered a sleep study?

09:58:36 13 A. No, it was ordered by Dr. Darby.

09:58:39 14 Q. Okay. You said that it revealed sleep apnea
09:58:44 15 and it produced an insufficient sample. I think you
09:58:46 16 were going to describe what did the -- Dr. Darby and
09:58:50 17 the team do after they got the first sleep study
09:58:53 18 results?

09:58:53 19 A. Because that one didn't tell us what we were
09:58:57 20 looking for -- it was just not an adequate sample --
09:59:01 21 we asked for a repeat sleep study. That was done,
09:59:06 22 and that was able to rule out the REM movement
09:59:14 23 disorder. And so, from that point on there was not
09:59:20 24 much discussion from anyone of dementia with Lewy
09:59:25 25 bodies.

09:59:25 1 Q. What -- besides having a larger sample in that
09:59:27 2 second sleep study, was there a difference with it
09:59:30 3 relating to the sleep apnea?

09:59:33 4 A. Well, here too he had sleep apnea, but the
09:59:39 5 treatment for it is continuous airway pressure.
09:59:46 6 It's a machine called a CPAP machine, and the
09:59:50 7 patient has to wear a mask or nasal pillows. The
09:59:55 8 airway is kept open through the application of
10:00:01 9 pressurized air. That was effective with
10:00:06 10 Mr. Brockman, and they calibrated what the machine's
10:00:10 11 settings should be and recommended he used that
10:00:12 12 nightly.

10:00:13 13 Q. And so, after the second -- well, what does it
10:00:18 14 mean when the term -- can you just explain the term
10:00:20 15 CPAP titration?

10:00:25 16 A. That's figuring out what the right machine
10:00:28 17 setting for that patient that -- it's the pounds of
10:00:33 18 pressure per square inch. And there's a dial on the
10:00:35 19 machine, and if one knows the code then one can
10:00:39 20 change what that setting is.

10:00:41 21 Used to have to go back to the
10:00:43 22 doctor for another visit to have a change. Now
10:00:45 23 people look it up on YouTube and change their own
10:00:49 24 settings. But the upshot of it is one will sleep
10:00:55 25 better, be better rested, have less daytime

10:01:02 1 sleepiness, and improvement of cognitive functioning
10:01:05 2 if one uses as described.

10:01:06 3 Q. In addition to the forensic benefit of getting
10:01:09 4 more REM sleep data, was there also a clinical
10:01:13 5 benefit, perhaps, to Mr. Brockman?

10:01:15 6 A. Yes.

10:01:15 7 Q. And could improved sleep -- or could improved
10:01:22 8 sleep have an impact on cognitive function?

10:01:25 9 A. Yes, but I don't want to overstate the extent
10:01:29 10 of it.

10:01:29 11 Q. Okay.

10:01:29 12 A. So the literature on CPAP and improved
10:01:33 13 cognition does show significant benefit, but it
10:01:36 14 doesn't take someone from moderately demented to
10:01:40 15 normal. It's not going to cure real dementia.

10:01:46 16 Q. Fair to say CPAP -- or a good night's rest
10:01:50 17 doesn't cure neurodegeneration?

10:01:52 18 A. Correct.

10:01:54 19 Q. What about other -- I want to talk about
10:01:56 20 relevant medical history, focusing on other systems
10:02:00 21 of the body. Was there anything -- other
10:02:03 22 significant medical history that you considered?

10:02:05 23 A. If you are talking about other systems of the
10:02:08 24 body, the bladder cancer would be a big one. But
10:02:10 25 there's a host of other medical problems that I

10:02:14 1 don't think are relevant.

10:02:15 2 Q. Well, just focusing on what's relevant then.

10:02:23 3 A. I would say the most relevant and recent set of
10:02:25 4 issues has to deal with these urinary tract
10:02:31 5 infections that turned into sepsis in at least two
10:02:34 6 of the three instances for which he was hospitalized
10:02:38 7 with both a urinary tract infection and also
10:02:47 8 delirium. Those were significant hospitalizations.
10:02:49 9 And delirium is a serious medical problem with a
10:03:01 10 high mortality rate. So those are recent enough to
10:03:05 11 be striking and important in this case.

10:03:09 12 Q. Well, has Mr. Brockman had urinary tract
10:03:13 13 problems since before recent times?

10:03:16 14 A. Yes, for years he's had urinary tract problems,
10:03:20 15 but none that led to sepsis until these, and none
10:03:25 16 that led to delirium until these.

10:03:27 17 Q. And is it the -- is it the urinary infection or
10:03:33 18 the sepsis that leads to delirium?

10:03:37 19 A. It's -- well, either one can. It's a lot
10:03:45 20 easier to understand how it happens when he's
10:03:48 21 septic, because if the urinary tract infection
10:03:51 22 spreads into the blood then of course it can more
10:03:57 23 readily affect the brain. But even without it being
10:04:02 24 detected in the blood by looking at whether bacteria
10:04:07 25 grow from a -- from an arterial blood sample, even

10:04:13 1 if one hasn't proved that, the infection itself can
10:04:19 2 create such a response in the body that ability to
10:04:25 3 think clearly is overwhelmed.

10:04:29 4 That's really what delirium is.
10:04:31 5 It's an acute state that can have many, many
10:04:34 6 different cause. But the brain is not functioning
10:04:38 7 properly for delirious patient.

10:04:42 8 Q. And would you agree sepsis is a pretty serious
10:04:47 9 condition?

10:04:47 10 A. Very.

10:04:47 11 Q. So if a healthy, young, cognitively normal
10:04:51 12 person were hospitalize would sepsis, could that
10:04:54 13 result in delirium?

10:04:55 14 A. Certainly.

10:05:01 15 Q. If you don't know, that's okay, but is the
10:05:04 16 sepsis that's happening -- is that related to
10:05:06 17 cognition?

10:05:08 18 A. I don't understand the question.

10:05:15 19 Q. I guess my question is you mentioned how
10:05:20 20 bacteria from a UTI can lead to sepsis. I'm
10:05:23 21 wondering if the bacteria leading to sepsis has
10:05:26 22 anything to do with the brain or its other areas of
10:05:30 23 the body? If you don't know, that's okay.

10:05:38 24 A. I think I can provide an answer that will
10:05:41 25 address that, but I believe the concept one needs to

10:05:47 1 have is that there are many, many causes of
10:06:00 2 delirium. Among the causes seen in delirium in
10:06:05 3 medical practice, generally alcohol would probably
10:06:08 4 be the most common, barbiturates and other
10:06:14 5 sedatives. Person can be perfectly healthy, take
10:06:17 6 too much at home and be brought to the hospital
10:06:21 7 delirious.

10:06:22 8 I don't know the frequency, but
10:06:26 9 other common ones would be liver failure, kidney
10:06:29 10 failure, complications of diabetes, fever of any
10:06:35 11 cause -- infection causing a fever.

10:06:45 12 So depending on the setting one is
10:06:48 13 looking at, the causes of delirium are variable.
10:06:52 14 It's one thing in the emergency room. It's another
10:06:53 15 in the ICU, and another in the geriatric ward.
10:07:00 16 There are many causes that lead to this final common
10:07:02 17 pathway of the brain not being able to function
10:07:07 18 adequately and presenting this delirious, confused
10:07:10 19 and inattentive state which the person's level of
10:07:13 20 arousal is quite variable.

10:07:16 21 Q. Is there any other --

10:07:18 22 A. That's always the brain.

10:07:19 23 Q. Okay.

10:07:20 24 A. But how it gets from the insole to the brain
10:07:24 25 problem is highly variable.

10:07:26 1 Q. Okay. Any other relevant medical history in
10:07:33 2 this case?

10:07:37 3 A. There was a UroLift procedure in June that was
10:07:41 4 done under general anesthesia. He was not under
10:07:44 5 anesthesia excessively long that one had to consider
10:07:50 6 whether that could have changed his mental state and
10:07:53 7 the aftermath, but there were no complications to
10:07:57 8 it. It was surgically successful.

10:07:59 9 Q. But is it possible that general anesthesia
10:08:02 10 could contribute to delirium?

10:08:04 11 A. Yes, particularly with some of the older ones,
10:08:12 12 but he wasn't delirious after this.

10:08:14 13 Q. And I know we talked about lot of different
10:08:17 14 materials you reviewed in this case. Like to sort
10:08:19 15 of get to your assessment of these materials. So
10:08:23 16 just starting off what, Doctor, can you tell us
10:08:25 17 about your assessment of the brain studies that have
10:08:28 18 been done in this case?

10:08:34 19 A. Well, I think the most basic point is that the
10:08:45 20 brain studies done in this case show that there has
10:08:48 21 been amyloid accumulating. No one can be sure for
10:08:55 22 how long, but it could have been accumulating for
10:08:58 23 years.

10:08:58 24 They tell us that there are
10:09:00 25 neurodegenerative changes in the brain, which are

10:09:06 1 visible through the hypometabolism through the
10:09:14 2 FTG-PET scans, through the less than maximal volume
10:09:21 3 on the MRI, but still in the normal range, and that
10:09:30 4 -- and none of these studies of the brain tell us
10:09:35 5 his cognitive function.

10:09:38 6 There is not a one-to-one
10:09:41 7 relationship between what's seen in any brain
10:09:46 8 imaging and cognitive function.

10:09:51 9 Q. So what -- moving to the collateral interviews,
10:09:53 10 what did they inform about Mr. Brockman's cognitive
10:09:57 11 function -- well, actually let me ask you. Is
10:09:59 12 cognitive function the thing we're all trying to
10:10:02 13 measure here?

10:10:03 14 A. Cognitive function is one of the big disputed
10:10:06 15 issues, how severely is a big question.

10:10:15 16 Q. What do the collateral interviews review about
10:10:18 17 his cognitive function?

10:10:20 18 A. The collateral witnesses describe him as acting
10:10:23 19 with varying degrees of impairment. Some describe
10:10:27 20 quite severe issues. For example, putting his pants
10:10:31 21 on his arms or shirt on his legs. That would
10:10:38 22 suggest quite severe cognitive impairment. Not
10:10:43 23 knowing how to move about his house or where he is
10:10:47 24 in his home.

10:10:48 25 Believing he's in Aspen when he's

10:10:52 1 really in Houston. Examples of this sort reported
10:10:58 2 by collateral witnesses are at the higher range of
10:11:08 3 severity of impairment. But collateral witnesses at
10:11:14 4 the same time period -- until at least recently --
10:11:17 5 also describe lesser degrees of impairment.

10:11:26 6 From the second and third hand
10:11:29 7 reports of collateral witnesses available to me, by
10:11:32 8 hearing what Mr. Brockman's wife or son told the
10:11:35 9 doctor and what that doctor decided to write that I
10:11:39 10 could later read, it's attenuated. I'm not able to
10:11:43 11 question the person.

10:11:45 12 The same thing is true when
10:11:49 13 Dr. Agronin interviews a collateral witness, I can
10:11:52 14 read what Dr. Agronin write -- writes about that,
10:11:58 15 but I'm not able to question that witness. And, of
10:12:02 16 course, I saw some of the testimony of collateral
10:12:06 17 witnesses here. And that's better than reading what
10:12:11 18 an interviewer wrote, because it's subject to
10:12:15 19 cross-examination and it's in more depth and it's
10:12:20 20 not selective.

10:12:25 21 So my view, just to cut to the
10:12:28 22 chase on it, is that I don't regard the collateral
10:12:34 23 witnesses in this case as necessarily valid
10:12:40 24 informants providing information on which I can
10:12:53 25 rely. I have no doubt that if we lined them all up,

10:12:58 1 we would find varying degrees of liability. I'll
10:13:03 2 leave it at that.

10:13:04 3 Q. Okay. Fair to say Mr. Brockman has been
10:13:07 4 subject to a very large number of very long forensic
10:13:13 5 interviews?

10:13:14 6 A. Yes, indeed.

10:13:15 7 Q. Okay. What did those inform about cognitive
10:13:17 8 function?

10:13:26 9 A. Well, here too we have considerable
10:13:32 10 variability. I think we'll get to look at the
10:13:34 11 details of it, but in May his functioning was
10:13:41 12 clearly far better than it appeared to be in July.
10:13:53 13 And in October, in my view, his functioning was
10:13:56 14 better than it appeared to be in July. But what's
10:14:00 15 happening in these forensic interviews is that, um,
10:14:04 16 experienced examiners get to question him and see
10:14:08 17 how he responds to that, and he gets to act as he
10:14:14 18 wishes to act.

10:14:16 19 And so, what we always have is a
10:14:21 20 performance. When he's subjected to testing, he's
10:14:27 21 performing on those tests. And we have to consider,
10:14:31 22 are we getting a reliable indicator of his actual
10:14:37 23 cognitive function at these times? And this is no
10:14:47 24 guarantee that we're getting valid result when we
10:14:52 25 talk to him.

10:14:53 1 What we have to look for, of
10:14:55 2 course, is are there times when preserved cognitive
10:14:59 3 function comes through in an interview in which he
10:15:08 4 otherwise seems quite impaired from time to time?
10:15:17 5 And I think in each of the interviews there are
10:15:19 6 examples of some impairment being shown and some
10:15:22 7 lack of impairment being shown. But how impaired he
10:15:28 8 looks is quite variable across these interviews.

10:15:31 9 Q. Let's talk about the test -- excuse me. Is
10:15:36 10 there one area where -- you describe a lot of things
10:15:39 11 where there's lots of variabilities. Is there an
10:15:42 12 area where Mr. Brockman's performance has been very
10:15:44 13 consistent?

10:15:44 14 A. Oh, yes. And this is one of the most
10:15:48 15 extraordinary and important things that since the
10:15:52 16 very first neuropsychological test battery was
10:15:57 17 administered in March of 2019, Mr. Brockman has been
10:16:05 18 performing at a very low level. And specifically,
10:16:10 19 if one looks at his memory since the beginning of
10:16:15 20 2019, he's been performing in the lowest first
10:16:20 21 percentile on memory.

10:16:24 22 Q. And you said from the beginning. Do you
10:16:26 23 remember the first time he had this type of testing
10:16:30 24 conducted?

10:16:32 25 A. I think I just mentioned that March 2019 was

10:16:38 1 Dr. York's first battery of neuropsychological test.
10:16:43 2 Q. Okay. So I'd like to just talk about some of
10:16:49 3 the documents and other materials that you had to
10:16:51 4 review. And I'd like to just start with, you know,
10:16:59 5 the medical records I guess --

10:17:00 6 MR. MAGNANI: I apologize, Your
10:17:01 7 Honor.

10:17:07 8 Q. You talked about how you looked at the
10:17:09 9 materials from his treating doctors, which trickled
10:17:11 10 in over time. I mean, how did those records -- what
10:17:14 11 did those records say, if you can summarize?

10:17:20 12 A. Well, different doctors are seeing different
10:17:23 13 things at different times because they arrived out
10:17:25 14 of order. It was somewhat difficult to keep all of
10:17:32 15 this straight. But what is observable is a
10:17:47 16 progressive reporting of signs and symptoms of
10:17:52 17 dementia by Mr. Brockman or his family members.

10:17:58 18 It's not always clear who is giving
10:18:00 19 the doctor information. But the -- the narrative
10:18:05 20 that the doctors are receiving is of progressive
10:18:10 21 decline. The doctors' opinions are varying over
10:18:23 22 time, and usually in the direction of Mr. Brockman
10:18:25 23 seeming worse and worse.

10:18:29 24 And one particularly notable
10:18:31 25 example where I happened to recall the timing was

10:18:37 1 Dr. Lai having evaluated Mr. Brockman over the
10:18:44 2 course of these years.

10:18:48 3 Q. I'm sorry, just -- Doctor, I want to interrupt
10:18:51 4 you for a second. Can you remind the Court, who is
10:18:53 5 Dr. Lai?

10:18:54 6 A. Dr. Eugene Lai, who is a neurologist and --
10:18:59 7 Mr. Brockman's treating neurologist -- and
10:19:03 8 considered Mr. Brockman to have Parkinson's disease
10:19:08 9 with mild cognitive impairment as recently as June
10:19:11 10 of this year. But in October of this year, for the
10:19:20 11 first time, described him as having Parkinson's
10:19:24 12 dementia. The record isn't clear as to the basis
10:19:28 13 for the change in diagnosis or phrasing, but the
10:19:34 14 record's clear that there's change from MCI, mild
10:19:40 15 cognitive impairment, to use of the term dementia in
10:19:43 16 Dr. Lai's records.

10:19:51 17 If we look at all of the records
10:19:53 18 and which terms people are using, there's a great
10:19:57 19 deal of discrepancy from early 2019, up to October
10:20:03 20 of 2021, until we get to October of 2021, where the
10:20:14 21 opinions are converging and using the term dementia.

10:20:18 22 Q. Besides reviewing all of these medical records,
10:20:20 23 did you also review videos of Mr. Brockman giving
10:20:23 24 speeches or deposition testimony?

10:20:24 25 A. Yes.

10:20:25 1 Q. What do those videos reveal about

10:20:28 2 Mr. Brockman's cognitive function?

10:20:29 3 A. In my view, the testimony that Mr. Brockman

10:20:36 4 gave to -- in both of the matters in 2019

10:20:40 5 demonstrates that he is not demented at the time of

10:20:45 6 that testimony. I observed the entire videotape of

10:20:52 7 the two days of testimony in early 2019, and read

10:20:57 8 the entire transcript for the non-videotaped

10:21:00 9 testimony later in 2019, and could not find evidence

10:21:06 10 of dementia there, and did find evidence of superior

10:21:11 11 mental functioning, superior cognitive skills.

10:21:15 12 Q. And I'm sorry, did you say speeches, too? Did

10:21:20 13 you watch any speeches?

10:21:21 14 A. I did.

10:21:22 15 Q. And just, I guess -- I know there were -- well,

10:21:24 16 do you watch a lot of speeches?

10:21:27 17 A. At least three from 2017, 2018 and 2019. And

10:21:36 18 as with the testimony, my opinion is the speeches

10:21:42 19 show that he was not demented as recently as late, I

10:21:48 20 think, November 2019. Now, one can see evidence of

10:21:54 21 Parkinson's disease motor symptoms, at least when

10:21:59 22 viewed in retrospect knowing he's been diagnosed

10:22:01 23 with that, but not of dementia.

10:22:07 24 Q. Do you remember the context -- I think you said

10:22:09 25 the November -- excuse me, the 2019 speech you

10:22:13 1 thought was around November of 2019. Do you
10:22:15 2 remember the context of these speeches?

10:22:18 3 **A.** Yes, these were company birthday parties of
10:22:22 4 Reynolds and Reynolds events.

10:22:26 5 **Q.** And how -- just what you describe --

10:22:30 6 **MR. MAGNANI:** -- and I'm trying to
10:22:31 7 avoid playing long segments of video, Your Honor,
10:22:34 8 just to amove things along --

10:22:36 9 **Q.** -- but how would you describe how Mr. Brockman
10:22:38 10 performed in these speeches?

10:22:39 11 **MR. MAGNANI:** These are in evidence,
10:22:40 12 too, Your Honor.

10:22:45 13 **THE WITNESS:** He is speaking
10:22:46 14 coherently, and carefully he's making few mistakes.
10:22:54 15 When he makes mistakes, he corrects himself. And
10:22:57 16 some he is extemporizing a great deal. In the 2019
10:23:04 17 one he is using notes, but he looks up appropriately
10:23:07 18 at the audience, makes eye contact with the
10:23:11 19 audience, adds comments to what seem to be in the
10:23:14 20 notes, doesn't lose his place in the notes, and is
10:23:21 21 doing a good job.

10:23:24 22 **Q.** And did you review a -- some e-mail
10:23:29 23 correspondence of Mr. Brockman's?

10:23:32 24 **A.** I did.

10:23:32 25 **Q.** Just top level first, what -- well, how does

10:23:36 1 your view of the e-mail correspondence inform your
10:23:40 2 opinion of his cognitive function?

10:23:42 3 **A.** I think the e-mails are extremely important in
10:23:46 4 showing Mr. Brockman's cognitive functioning beyond
10:23:51 5 where we have the video evidence. That's only from
10:23:56 6 2019. But the e-mails show that at least through
10:23:59 7 November of 2020, Mr. Brockman is writing coherent
10:24:07 8 e-mails, sometimes being clever. He's understanding
10:24:12 9 what's being said to him. He's responding
10:24:20 10 intelligently.

10:24:21 11 Some of this is technical matters, such
10:24:24 12 as discussions with his accountant about gift taxes
10:24:27 13 and whether they will be owed and tax planning
10:24:38 14 purposes.

10:24:38 15 **Q.** We can get into some examples, but you said
10:24:40 16 through November of 2020. Have you reviewed any of
10:24:43 17 Mr. Brockman's e-mails from after November of 2020?

10:24:45 18 **A.** I've seen no e-mails from after November 2020
10:24:50 19 from after the time he stepped down.

10:24:53 20 So this window into his mind that
10:24:57 21 personal writings like that can provide closes at
10:25:01 22 that point.

10:25:03 23 **Q.** Okay.

10:25:03 24 **THE COURT:** Can I ask a quick question?
10:25:05 25 I mean, in formulating your opinion, would it be

10:25:10 1 helpful to have those e-mails after November 2020?

10:25:15 2 Do you think that would be helpful to you?

10:25:18 3 THE WITNESS: If there were any, that
10:25:19 4 would be extremely helpful. But what Mr. Brockman
10:25:23 5 has said is that he stopped being able to write
10:25:29 6 e-mails. I don't know if there are any.

10:25:32 7 THE COURT: Okay.

10:25:34 8 MR. MAGNANI: Maybe this might help,
10:25:35 9 Your Honor.

10:25:36 10 Q. Do you know -- well, did you -- was the source
10:25:38 11 of the e-mails UCSH or Reynolds and Reynolds?

10:25:41 12 A. Yes.

10:25:41 13 Q. Okay. Do you know Mr. Brockman stepped down
10:25:45 14 from that company?

10:25:46 15 A. Yes.

10:25:47 16 Q. When did he step down?

10:25:49 17 A. November 2020.

10:25:53 18 Q. I'm just going to go through a few -- not all
10:25:55 19 of these, but can we please pull up Exhibit 44?

10:25:59 20 MR. MAGNANI: And, Mr. Bourget, can you
10:26:01 21 let me know if any of these have not been admitted,
10:26:04 22 please?

10:26:05 23 I believe they all have been
10:26:07 24 admitted, but just want to make sure, Your Honor.

10:26:16 25 Q. Dr. Dietz, what -- tell us about how Exhibit 44

10:26:24 1 informs your opinion?

10:26:25 2 **A.** Well, this shows that as late of June 2020,
10:26:30 3 Mr. Brockman was talking about getting to arrange
10:26:37 4 and putting rounds through his SCAR, which is a
10:26:43 5 Belgian manufactured, high-end version of the AR-15.

10:27:00 6 **Q.** Sorry, anything else?

10:27:02 7 **A.** Well, the fact -- the fact that he's continuing
10:27:06 8 to shoot has some significance to me.

10:27:12 9 **Q.** And just -- I mean, besides the thing that he's
10:27:15 10 describing doing, does the writing of an e-mail like
10:27:20 11 this also have any significance?

10:27:28 12 **A.** It's a short e-mail, but it is formatted
10:27:34 13 correctly. The punctuation is correct. It's
10:27:41 14 coherent. It's logical. You know, it's a window
10:27:44 15 into the fact this is a mind that is functioning
10:27:46 16 adequately.

10:27:53 17 **MR. MAGNANI:** And can we pull up
10:27:55 18 Exhibit 45, please?

10:27:56 19 **Also, Your Honor, I think that the**
10:27:57 20 **Defense reserved objection on these exhibits due to**
10:28:01 21 **-- on relevance grounds. So -- but I also think**
10:28:05 22 **they might have been pre-admitted, so just ask for**
10:28:07 23 **some clarification.**

10:28:08 24 **MR. LOONAM:** We'll take them as they
10:28:10 25 come along.

10:28:13 1 MR. MAGNANI: Okay. Then I'll admit --
10:28:15 2 well, I'll do it at the end.

10:28:16 3 Q. So Exhibit 45 --

10:28:18 4 MR. MAGNANI: Can you please pull that
10:28:19 5 one up? Again, if you can zoom in on the sort of
10:28:27 6 text portion.

10:28:30 7 Q. Dr. Dietz, the question will be, after you've
10:28:33 8 had time, how does this e-mail inform your opinion?

10:28:39 9 A. This is a month later, July of 2020, and is a
10:28:46 10 considerably more detailed and significant set of
10:28:50 11 issues in which Mr. Brockman is writing about losses
10:28:53 12 in various entities, and how he can use them against
10:28:57 13 his W2 income. I think the -- arguably the worst
10:29:08 14 feature of this e-mail is that he seems to imply
10:29:14 15 that he might be able to use losses from these
10:29:21 16 Nehemiah entities against 60 million in W2 income.

10:29:29 17 Maybe I'm naive, but I thought
10:29:30 18 there was a \$3,000 a year limit of the use of losses
10:29:36 19 from investment income against earned income. And I
10:29:40 20 would expect Mr. Brockman to know that, but maybe
10:29:44 21 both of us are wrong on this point.

10:29:47 22 Q. Well, let's just -- actually, before taking
10:29:52 23 that down, directing your attention to the PPS line,
10:29:57 24 is Donna Ball a person you tried to interview in it
10:30:05 25 this case?

10:30:05 1 **A.** Yes, and she was in touch with him every day
10:30:08 2 according to this while he was way.

10:30:10 3 **Q.** Were you able to interview her?

10:30:12 4 **A.** No, just polite refusal.

10:30:16 5 **Q.** Like to pull up Exhibit 47, please. I
10:30:24 6 apologize, Dr. Dietz. This one looks like it might
10:30:27 7 be a multipage document. If it's helpful for you,
10:30:30 8 there are hardcopies of these in the binders. You
10:30:33 9 can also just direct us where to zoom in if you can,
10:30:36 10 because my question is how does this inform your
10:30:38 11 opinion?

10:30:39 12 **A.** What's the number?

10:30:41 13 **Q.** It's Exhibit Number 47.

10:31:11 14 **A.** If we're talking about the Don Passmore
10:31:18 15 correspondence --

10:31:19 16 **Q.** Yeah, Mr. Bourget if you can start us off by
10:31:22 17 zooming in on the top and take it from there maybe?

10:31:26 18 **A.** This I alluded to earlier that it is
10:31:28 19 correspondence with his accountant concerning
10:31:32 20 whether gift taxes are going to be due.

10:31:39 21 **Q.** And does this inform your opinion about
10:31:41 22 Mr. Brockman's cognitive function?

10:31:43 23 **A.** Yes, this -- this is all coherent, reasonable
10:31:47 24 stuff for him to be inquiring about. And this is
10:31:54 25 late in 2020, October. It shows a sophistication

10:32:03 1 about some of these issues.

10:32:05 2 Q. And, Dr. Dietz, I know you are looking at the
10:32:09 3 document, but can we move along, or is there
10:32:12 4 something else you wanted to say about that?

10:32:15 5 A. No, that's all.

10:32:16 6 Q. I want to pull up 70, 7-0. This one I have
10:32:23 7 ready for you, Dr. Dietz.

10:32:25 8 MR. MAGNANI: May I approach the
10:32:26 9 witness, Your Honor?

10:32:26 10 THE COURT: You may approach.

10:32:35 11 MR. MAGNANI:

10:32:35 12 Q. It's on the screen. And again, if we can pull
10:32:38 13 up 70, and maybe start by zooming in on the top.

10:32:42 14 Dr. Dietz, when you are ready, could
10:32:46 15 you please just tell us how this e-mail informs your
10:32:49 16 opinion of Mr. Brockman's cognitive function?

10:32:52 17 A. This is November 13th of 2020 when Mr. Brockman
10:32:59 18 is being declared mild or moderately demented by
10:33:05 19 some of the people who have seen him. And he's
10:33:10 20 writing an e-mail that is well formed, completely
10:33:17 21 coherent, addressed to the correct person talking
10:33:22 22 about his family being off the Reynolds and Reynolds
10:33:27 23 healthcare plan by end of year at the latest and how
10:33:32 24 he's moving them to a small group plan administered
10:33:36 25 by another company.

10:33:38 1 He's asking to be billed for the
10:33:41 2 cost for those who weren't Reynolds's employees so
10:33:47 3 he can compensate the company for what it had paid,
10:33:51 4 and he wanted lots of detail with monthly amounts.
10:33:58 5 He thanks Craig Moss for helping him correct this.

10:34:02 6 So this is coherent. Thoughtful.
10:34:07 7 Reflects that he has memory for these events,
10:34:14 8 judgement of the importance of getting this issue
10:34:19 9 properly resolved and papered in the files, and
10:34:24 10 putting money where it belongs. This is consistent
10:34:30 11 with normal cognitive function.

10:34:32 12 Q. And what was the date of that e-mail?

10:34:34 13 A. November 13, 2020.

10:34:40 14 MR. MAGNANI: Now, at this time, Your
10:34:42 15 Honor, I'd like to move to admit 44, 45, 47 and 70,
10:34:49 16 which are the e-mails that the witness just
10:34:52 17 testified about.

10:34:53 18 MR. VARNADO: No objection.

10:34:53 19 THE COURT: Without objection, they are
10:34:55 20 admitted.

10:34:58 21 MR. MAGNANI:

10:34:58 22 Q. I'd also like to move to admit -- can we go
10:35:01 23 back to the PowerPoint deck, please?

10:35:09 24 While we're doing that, Dr. Dietz,
10:35:11 25 did you prepare to talk about other e-mails as well

10:35:14 1 today?

10:35:15 2 **A.** Yes.

10:35:15 3 **Q.** And are those the exhibit numbers listed in
10:35:18 4 your PowerPoint deck?

10:35:19 5 **A.** Okay.

10:35:20 6 **Q.** Did they also inform your opinion on cognitive
10:35:23 7 function?

10:35:23 8 **A.** Yes, only in the same way that as the testimony
10:35:28 9 and speeches from 2019 showed a window into normal
10:35:33 10 performance, so too did these e-mails from 2020.

10:35:40 11 **Q.** So is this --

10:35:41 12 **A.** Just the e-mail window is more recent than the
10:35:44 13 videotape window.

10:35:46 14 **Q.** And so, are these other examples of relatively
10:35:49 15 recent e-mails?

10:35:50 16 **A.** Yes.

10:35:51 17 MR. MAGNANI: Okay. And without having
10:35:52 18 to show the witness all of these, I would move to
10:35:55 19 admit 55, 56, 69, 54, 57, 46, 48, 52 -- that's all I
10:36:08 20 got.

10:36:08 21 THE COURT: Okay.

10:36:09 22 MR. VARNADO: Your Honor, I'd like to
10:36:11 23 have a chance to look at them, and we can tell them
10:36:13 24 over the break if we object.

10:36:14 25 THE COURT: Okay. But what would be

10:36:16 1 the objection? I'm trying to figure out --

10:36:17 2 MR. VARNADO: I don't even know what
10:36:18 3 they are.

10:36:19 4 THE COURT: Okay.

10:36:20 5 MR. MAGNANI: I think these were
10:36:21 6 subject to a stipulation, Your Honor, about
10:36:23 7 authenticity. And the Defense reserved, I think,
10:36:25 8 objection on relevance. But this is where --

10:36:27 9 THE COURT: Okay. This is where you
10:36:29 10 are. Great.

10:36:29 11 MR. VARNADO: We'll take a look at
10:36:31 12 break and get back to you.

10:36:32 13 THE COURT: Okay. Great.

10:36:33 14 MR. MAGNANI: I'm sorry if I just don't
10:36:34 15 remember. There was a ruling -- other ones were
10:36:36 16 admitted?

10:36:37 17 MR. VARNADO: Yes.

10:36:38 18 MR. MAGNANI: Okay.

10:36:41 19 THE COURT: Are we moving on to a
10:36:43 20 different topic?

10:36:45 21 MR. MAGNANI: Yeah, this might be a
10:36:46 22 good point for a break, Your Honor.

10:36:49 23 MR. LOONAM: Your Honor, if I can raise
10:36:50 24 one issue prior to the break?

10:36:51 25 THE COURT: Sure.

10:36:52 1 MR. LOONAM: We understand Your Honor's
10:36:54 2 ruling to allow this expert to testify beyond the
10:36:59 3 findings and bases set forth in his expert report.
10:37:02 4 Not -- not quibbling with that, but we do take issue
10:37:06 5 with respect to, um -- in particular the last two
10:37:10 6 slides of this deck. This witness is not a
10:37:15 7 neuroradiologist. This witness is not a
10:37:18 8 neurologist.

10:37:18 9 And With respect to the last slide,
10:37:20 10 in particular, DX-58, it's not even in evidence,
10:37:23 11 Your Honor. That slide was used during
10:37:26 12 cross-examination of Dr. Denney. Dr. Wisniewski,
10:37:30 13 who is a neurologist, testified that this slide, in
10:37:34 14 particular, because it's quantitative -- not the
10:37:38 15 qualitative -- the quantitative longitudinal
10:37:41 16 comparison between the 2018, study and the 2021 MRI
10:37:46 17 study -- because of the imprecision of that
10:37:50 18 qualitative analysis, and then also because the
10:37:53 19 slices were different -- like, highly technical
10:37:55 20 slices were different used in comparing 2018 to
10:38:01 21 2021, that this comparison was not reliable and
10:38:04 22 potentially misleading.

10:38:05 23 And so, what it's being used for
10:38:07 24 here is -- is unclear. This was used during the
10:38:12 25 cross of Dr. Denney who said he relied on the

10:38:14 1 quantitative analysis in reaching his conclusions,
10:38:18 2 and then explained away during the end of the cross
10:38:20 3 that quantitative analysis was not particularly
10:38:23 4 precise or reliable.

10:38:24 5 Is um, and so this is the subject
10:38:26 6 of -- of neurology. Neuroradiology was not within
10:38:34 7 this witness's expert report. And so, frankly we
10:38:38 8 strongly object to these last two slides.

10:38:45 9 THE COURT: Let me take a break. You
10:38:46 10 consider the objections to the exhibits that you
10:38:48 11 were talking about, Mr. Varnado.

10:38:54 12 MR. VARNADO: Yes, Your Honor.

10:38:54 13 THE COURT: Hear from you, counsel for
10:38:58 14 the prosecution, and let's say we're going to take a
10:38:59 15 break until 11 o'clock. I do understand your
10:39:05 16 objection and want to hear the response. I just
10:39:06 17 want to take a break now and we can continue.

10:39:09 18 MR. LOONAM: Understood.

10:39:11 19 THE COURT: Thank you, Dr. Dietz.
10:39:14 20 We'll be back.

11:08:35 21 (Whereupon, a recess was held.)

11:12:40 22 THE COURT: You may continue.

11:12:41 23 MR. MAGNANI: Thank you, Your Honor. I
11:12:42 24 spoke to Defense Counsel, and I think we have an
11:12:46 25 agreement with respect to those exhibits I moved to

11:12:48 1 admit before.

11:12:49 2 THE COURT: Okay.

11:12:49 3 MR. MAGNANI: Please correct me if I'm
11:12:51 4 wrong, but at this time I move to admit Exhibits 55,
11:12:54 5 56, 69, 54, 57, 46, 48 and 52.

11:13:05 6 THE COURT: Okay.

11:13:06 7 MR. VARNADO: No objection, Your Honor.

11:13:07 8 THE COURT: Without objection, they are
11:13:08 9 admitted. Counsel, just for scheduling purposes --
11:13:11 10 I hate to be doing this, but I've got another matter
11:13:14 11 I have to handle at 12:45. So we're going to
11:13:17 12 continue again until 12:15. Then we'll break from
11:13:21 13 12:15 to 1:15, and then pick up again at this time.

11:13:25 14 So we're not going to be able to
11:13:27 15 work -- just going to be like we have been. We're
11:13:30 16 going to work into lunchtime.

11:13:34 17 MR. LOONAM: Yes, Your Honor. I just
11:13:35 18 wanted to note this was -- there's a pending
11:13:37 19 objection with respect to the last two slides.

11:13:40 20 THE COURT: Right.

11:13:41 21 MR. LOONAM: Because the last slide is
11:13:43 22 not in evidence. You know, the testimony is it's,
11:13:45 23 you know, not reliable because of the difference
11:13:48 24 with the quantitative analysis as longitudinal.
11:13:53 25 This expert is not a neurologist or

11:13:55 1 neuroradiologist. Not in his report. And so, we
11:13:59 2 object to the inclusion of that and the slide
11:14:01 3 previous, which is the neurology scans comparison.

11:14:06 4 THE COURT: Okay. I'm going to take
11:14:08 5 the objection under advisement. I need you to lay a
11:14:11 6 foundation, and I need to hear the foundation. Once
11:14:13 7 I hear it, I can make the call on the objection. So
11:14:17 8 when you get to that point don't say, "Judge, now
11:14:22 9 I'm laying a foundation for the use of these
11:14:24 10 slides."

11:14:25 11 Lay the foundation, and then I'll
11:14:26 12 entertain the objection again.

11:14:27 13 MR. MAGNANI: I'll try to remember to
11:14:30 14 do that, Your Honor. For the record, the Government
11:14:32 15 disagrees with some of the characterization of the
11:14:35 16 testimony, but we can pick this up later.

11:14:38 17 THE COURT: As I said, when you get
11:14:39 18 into it -- and I'll be following along. The nice
11:14:42 19 thing about the printouts, I can follow along. When
11:14:45 20 we get near that page, I'll be listening for the
11:14:48 21 foundation. You can remember. I can remember. The
11:14:49 22 objection's already on the table.

11:14:51 23 MR. MAGNANI: Okay. Great.

11:14:54 24 Q. So, Dr. Dietz, I think where we left off was as
11:14:58 25 you described the window of e-mail correspondence

11:15:01 1 closed. So now what I want to do is move into where
11:15:05 2 a different window opened, which was these
11:15:08 3 videotaped exams we've been talking about. Can I
11:15:10 4 ask you first -- well, I think you already testified
11:15:17 5 about early May Darby exam; is that right?

11:15:19 6 **A.** Yes.

11:15:19 7 **Q.** That was the exam where the Defendant opened up
11:15:24 8 box of medical records in his home?

11:15:26 9 **A.** Correct.

11:15:27 10 **Q.** We don't need to go back into that exam if you
11:15:31 11 discussed it. I need to go into the exams you and
11:15:34 12 Dr. Denney did. If you could just describe what
11:15:39 13 happened in those exams -- could you please do that?

11:15:44 14 **A.** The first day, which was May 18, 2021, I took
11:15:51 15 the lead in interviewing Mr. Brockman about his life
11:15:54 16 history, and he gave a detailed, coherent life
11:16:00 17 history story. And at the end, he told me that he
11:16:03 18 doesn't think anyone's ever asked him in that depth
11:16:08 19 before about his life story. And I felt it was an
11:16:12 20 adequate representation of life story, which is
11:16:15 21 actually an important part of trying to look where
11:16:20 22 disease processes where problems arise. If one
11:16:27 23 doesn't have the life story, one doesn't know the
11:16:30 24 context.

11:16:32 25 **Q.** And I know you've testified already about

11:16:36 1 Mr. Brockman's life story. That was on May 18th
11:16:38 2 that interview; right?

11:16:39 3 A. Yes.

11:16:40 4 Q. Okay. And from May 18th and May 20th together,
11:16:49 5 what was your overall assessment of Mr. Brockman?

11:16:54 6 A. Well, his memory was good on many topics.

11:17:05 7 Obviously, it was good on these remote topics about
11:17:08 8 his childhood and early life, but it was also good
11:17:13 9 on recent things, too.

11:17:14 10 For example, he had moved in February.
11:17:19 11 When I asked him about his prior house, he gave a
11:17:23 12 very detailed, coherent description of it, which
11:17:28 13 actually tracks well with what I was able to look up
11:17:31 14 on a realtor's website about that property.

11:17:35 15 And so, this was a man who could
11:17:38 16 communicate recent knowledge adequately. I talked
11:17:45 17 to him about a couple business points, and these are
11:17:50 18 things I had learned about from his speeches, but I
11:17:54 19 asked him if he could educate me, for example, on
11:17:56 20 how many direct points an executive should have.
11:18:02 21 And he gave a good description of one.

11:18:06 22 One should limit the number of
11:18:08 23 direct reports and his idea of the ideal number of
11:18:12 24 direct reports. This was all reasonable discussion
11:18:14 25 about business.

11:18:20 1 Q. Did you also ask him about any bad financial
11:18:23 2 incidents described by his wife previously to
11:18:25 3 Dr. Darby?

11:18:31 4 A. Yes, there -- Mrs. Brockman had mentioned two
11:18:35 5 bad financial decisions that were the examples she
11:18:36 6 gave of his problems in judgment. One was the
11:18:39 7 purchase of the yacht, the Albula -- Abdula -- I'm
11:18:47 8 not sure how one pronounces it. She thought that a
11:18:54 9 mistake, that she thought it overly costly. I don't
11:18:56 10 disagree with her about that, but he seemed to
11:18:59 11 recognize that there were -- there was a dispute in
11:19:06 12 the marriage about it. The other was an investment
11:19:15 13 in a software company she thought was quite foolish.
11:19:18 14 And he was able to describe what that investment had
11:19:20 15 been, and why he believed that at the time he made
11:19:24 16 the investment that there was going to be a coming
11:19:28 17 need for cyber security, and whoever could develop
11:19:32 18 very good software in the cyber security space was
11:19:36 19 going to make a killing.

11:19:37 20 He invested large sum of personal
11:19:40 21 money in that. I think it was sixty million
11:19:46 22 dollars. And he didn't pay close enough attention
11:19:50 23 to the man he trusted to develop it all, and the
11:19:56 24 investment was a bust. And he disagreed with his
11:19:58 25 wife as to whether that had been foolhardy.

11:20:01 1 But my understanding of it was that
11:20:03 2 it was a great idea, and he probably didn't pay
11:20:05 3 close enough attention and he lost that money. But
11:20:12 4 I think he's right that it was a wonderful time to
11:20:15 5 start looking into that business in a big way.

11:20:19 6 Q. Was there also -- and I'm just -- the
11:20:24 7 interviews that we're talking about now, these are
11:20:26 8 between May 18th and May 20th; right?

11:20:31 9 A. Correct.

11:20:32 10 Q. Was there also an interview on May 19th?

11:20:34 11 A. On May 19th, Dr. Denney did testing of
11:20:37 12 Mr. Brockman. I wasn't present for that, nor was it
11:20:39 13 videotaped.

11:20:40 14 Q. But do you know how he did on that testing?

11:20:43 15 A. I do.

11:20:44 16 Q. How did he do?

11:20:47 17 A. His performance was poor, and his validity
11:20:55 18 testing showed that the testing was invalid.

11:21:00 19 Q. And how -- how consistent was that with your
11:21:04 20 observations of him on the 18th and the 20th of May?

11:21:08 21 A. It was not consistent with the observations of
11:21:13 22 him in the interview context on those days. But, of
11:21:16 23 course, it was consistent with his tanking all of
11:21:19 24 the prior neuropsychological tests, too.

11:21:23 25 Q. During your interview days that you were

11:21:26 1 present for, was there any competency testing
11:21:29 2 administered?

11:21:30 3 **A.** Yes.

11:21:30 4 **Q.** Can you describe that, please?

11:21:33 5 **A.** So there are two different things that were
11:21:35 6 done. Only one should be called testing. There is
11:21:37 7 a standardized interview protocol for
11:21:42 8 semi-structured interview that's used to assess
11:21:45 9 competence to stand trial. Dr. Denney administered
11:21:49 10 one that he frequently uses, which of course
11:21:53 11 provides him a baseline to compare it to others.

11:21:59 12 And although Mr. Brockman wouldn't
11:22:01 13 discuss the charges against him, his performance on
11:22:04 14 that semistructured interview showed him to be
11:22:09 15 competent to stand trial the way this is usually
11:22:11 16 assessed. In addition to that, I also asked him
11:22:17 17 questions in the May interviews regarding certain
11:22:24 18 aspects of the indictment. And he had a
11:22:35 19 more-than-adequate grasp of the aspects that I asked
11:22:40 20 him about.

11:22:41 21 In fact, he even described some of
11:22:43 22 the defenses available to him. I was simply asking
11:22:49 23 who's individual number one in the indictment. And
11:22:52 24 he told me, and talked about why Mr. Tamine was
11:23:01 25 doing these things. He described all of the things

11:23:04 1 one hears defendants say about their coconspirators
11:23:10 2 and the people who have been granted immunity. He
11:23:18 3 said Mr. Tamine might have been creating a fake
11:23:21 4 e-mail stream in order to further his
11:23:26 5 self-interests, and told me how easy it was to
11:23:31 6 create fake e-mails.

11:23:32 7 He understood that FBAR was a
11:23:37 8 reporting requirement. He distinguished between the
11:23:44 9 trust as an entity and his person as an entity, and
11:23:50 10 indicated that the Government was trying to treat
11:23:54 11 him as if he were the same entity as the trust and
11:24:02 12 that was wrong. He objected to some of the
11:24:05 13 Department of Justice's behavior, and blamed them
11:24:08 14 for leaking personal information about him. This
11:24:18 15 was all coherent. He understood the charges he was
11:24:21 16 facing. He was able to discuss his position on
11:24:24 17 these things.

11:24:27 18 And based on both the competency
11:24:30 19 testing and that kind of interview reporting, I did
11:24:33 20 not think it was even a close call as to whether he
11:24:36 21 was competent to stand trial at that time.

11:24:39 22 Q. Was your confidence in the May evaluation an
11:24:43 23 important part of your opinion today still?

11:24:47 24 A. Yes.

11:24:49 25 MR. MAGNANI: Your Honor, at the this

11:24:50 1 time -- so Government's Exhibit 5 is two transcripts
11:24:54 2 stuck on top of each other from the May 18th and
11:24:57 3 May 20th interviews. So it's a little confusing,
11:25:01 4 but what I've done is marked as 5-A -- Government's
11:25:06 5 5-A, Pages 99 -- sorry, this is of the May 20th
11:25:11 6 transcript, Pages 99 through the end.

11:25:14 7 And I think -- well, let me hand
11:25:16 8 these around. May I approach the witness, Your
11:25:30 9 Honor?

11:25:31 10 THE COURT: You may.

11:25:50 11 MR. MAGNANI:

11:25:52 12 Q. And, Dr. Dietz, can you just flip that for a
11:25:55 13 second and familiarize yourself with it enough to
11:25:58 14 answer this question. Are many of the things that
11:26:00 15 you just testified about the Defendant talking about
11:26:05 16 the case, are those encapsulated in this portion of
11:26:08 17 the transcript?

11:26:08 18 A. Yes, they are.

11:26:11 19 MR. MAGNANI: I would move to admit
11:26:13 20 this, just to make things easier, as Government's
11:26:16 21 5-A, which again is just a portion of Government's
11:26:19 22 5.

11:26:19 23 MR. VARNADO: No objection.

11:26:20 24 THE COURT: Without objection, it is
11:26:22 25 admitted.

11:26:32 1 MR. MAGNANI:

11:26:33 2 Q. How far did you get, Doctor, in your
11:26:35 3 discussions with the Defendant about the case?

11:26:39 4 A. About the case?

11:26:40 5 Q. Yeah, about the facts of the case?

11:26:47 6 A. I would say not too far, but what we did cover
11:26:49 7 was all evidence of competence. In other words,
11:26:59 8 didn't say anything that made no sense or that was
11:27:03 9 clearly wrong when talking about these case-related
11:27:08 10 facts. At -- or at least to my knowledge.

11:27:15 11 Q. And then, Dr. Dietz -- and I'm not -- you
11:27:24 12 testified prior to the break about -- I'm sorry to
11:27:27 13 sort of jump around here -- about evaluation with
11:27:31 14 Dr. Lai when MCI was diagnosed?

11:27:35 15 A. Yes.

11:27:35 16 Q. And can you just -- do you remember when the
11:27:39 17 last time Dr. Lai diagnosed MCI, if you can
11:27:43 18 remember?

11:27:43 19 A. I think it was in June.

11:27:45 20 Q. Okay. So you said you were confident at this
11:28:01 21 point, but did something happen after the May exams?

11:28:04 22 A. Yes, a number of things happened after the May
11:28:09 23 exam, and after the report I submitted in June.

11:28:10 24 Q. And just -- I know we've covered a lot of it,
11:28:13 25 but can you just briefly talk about what happened

11:28:15 1 and why that was concerning to you?

11:28:18 2 **A.** Well, one thing that occurred that was not
11:28:19 3 concerning, just belated, was we began to get a lot
11:28:24 4 of the medical records, including the complete
11:28:29 5 records from the sepsis and delirium hospitalization
11:28:33 6 that occurred prior to this exam. And thousands of
11:28:45 7 pages of medical records began to arrive after that
11:28:50 8 exam was completed. But then significant events in
11:28:53 9 the world that occurred had to do with
11:28:56 10 Mr. Brockman's subsequent hospitalizations in
11:29:00 11 UroLift procedure.

11:29:02 12 **Q.** And so, are you talking about June
11:29:06 13 hospitalization?

11:29:08 14 **A.** May/June, yes.

11:29:09 15 **Q.** Was there -- well, let me ask you, was
11:29:13 16 Mr. Brockman hospitalized for sepsis prior to your
11:29:17 17 May -- earlier in the year?

11:29:19 18 **A.** Yes.

11:29:19 19 **Q.** Do you remember when his first hospitalization
11:29:22 20 for sepsis was in 2021?

11:29:27 21 **A.** I couldn't give you the date right now.

11:29:30 22 **Q.** Okay. So after -- just to try to get through
11:29:35 23 this quickly, you would agree that the delirium in
11:29:38 24 those hospitalizations could cause cognitive decline
11:29:42 25 that's pretty serious?

11:29:43 1 A. Of course.

11:29:44 2 Q. Okay. I want to turn your attention to July,
11:29:46 3 after your expert reports have been filed, did you
11:29:48 4 review the Defense experts reported videos from July
11:29:53 5 of 2021?

11:29:54 6 A. Yes.

11:29:54 7 Q. Can you just describe them, please?

11:29:58 8 A. This was a very different presentation of
11:30:02 9 Mr. Brockman. He appeared much more impaired than
11:30:06 10 he had in May. I didn't think there was any doubt
11:30:15 11 about a dramatic change in his appearance. And if
11:30:20 12 one goes step-by-step through important facts of
11:30:24 13 cognitive functioning, his memory was variable.
11:30:29 14 Certainly worse than that. His orientation was
11:30:31 15 variable, just knowing where he was and what he was
11:30:34 16 doing and the date.

11:30:35 17 He had even more trouble than he
11:30:37 18 had in the past in sequencing events, like how long
11:30:41 19 ago hospitalization was or in what order things
11:30:44 20 occurred. He seemed to have very poor attention
11:30:50 21 during that interview. There was lots of confusion.
11:30:55 22 He seemed not to know the context. I think he said
11:31:02 23 -- when asked why we were here today by Dr. Agronin,
11:31:05 24 he said, "To take my deposition."

11:31:09 25 He seemed to have difficulty

11:31:12 1 understanding which side Dr. Agronin had been
11:31:15 2 retained by. There were times he answered questions
11:31:20 3 as if he were being asked about the civil suit
11:31:24 4 against Reynolds and Reynolds, as opposed to his
11:31:26 5 criminal case.

11:31:28 6 Q. And, Dr. Dietz, was this the exam we watched a
11:31:32 7 sample of this when Dr. Darby was on the stand?

11:31:34 8 A. Yes.

11:31:38 9 Q. Did he discuss the criminal case at all in this
11:31:42 10 exam?

11:31:42 11 A. No.

11:31:42 12 Q. I'd like to jump ahead now to the October
11:31:46 13 examination. Um, can you describe, um -- well, were
11:31:51 14 there two set of examinations in October?

11:31:52 15 A. There were.

11:31:54 16 Q. Who did the first set of examinations?

11:31:55 17 A. The first was done by the Defense experts, and
11:32:03 18 that's Dr. Guilmette and Dr. Agronin.

11:32:07 19 Q. And just can you describe what you observed
11:32:09 20 from those recorded examinations?

11:32:11 21 A. Sure. Here there were good performances and
11:32:17 22 bad performances. He recognized the faces of both
11:32:21 23 examiners, knew some names of his lawyer and
11:32:25 24 Dr. Pool and Dr. Lerner.

11:32:28 25 He was slow in responding and

11:32:30 1 imprecise in what I think is already shown a video
11:32:34 2 slip when he was asked questions about wearing masks
11:32:38 3 and, "Why are we doing that?"

11:32:42 4 But he was eventually able to say
11:32:45 5 he had two doses of the Moderna vaccine, that it was
11:32:51 6 protecting his family, and that it was for COVID.
11:32:52 7 It was slow to get that out of him. He was
11:32:56 8 seemingly less confused and more attentive than he
11:32:59 9 had been in July, but still seemed confused between
11:33:05 10 the civil and criminal cases, and said he didn't
11:33:12 11 know his address. He gave incorrect estimates of
11:33:15 12 the time since previous events, which is that same
11:33:18 13 kind of sequencing difficulty.

11:33:22 14 Q. Now, doctor, after that you had the chance to
11:33:25 15 interview him again; is that right?

11:33:26 16 A. Yes.

11:33:27 17 Q. Can you please describe when that was and what
11:33:30 18 happened?

11:33:30 19 A. So this is a few weeks later on October 20th,
11:33:35 20 Dr. Denney and I spent a day with the Defendant.
11:33:41 21 And on that occasion, I would say he acted much more
11:33:48 22 impaired than he had in May when we saw him --
11:33:53 23 varying degrees of impairment throughout our time
11:33:57 24 with him. He recalled my name and displeasure with
11:34:00 25 me for the afternoon of May 20th when I confronted

11:34:03 1 him with some of the information in the indictment
11:34:06 2 and a couple of e-mails, and he didn't like being
11:34:12 3 confronted with that material when asked about
11:34:23 4 recent events recalled the January 6th riot. He did
11:34:27 5 not seem to know others had referred to as an
11:34:32 6 insurrection.

11:34:34 7 He did know there was a problem at
11:34:35 8 the border of US and Mexico, and that resources were
11:34:39 9 overrun, but didn't seem to have depth of knowledge
11:34:42 10 and didn't recall the incident in which Haitian
11:34:49 11 immigrants had gathered under a bridge, which had
11:34:52 12 recently been in the news.

11:34:56 13 Q. Dr. Dietz, if I can stop you there. You
11:34:59 14 mentioned the riot versus insurrection. Do you have
11:35:04 15 any understanding of the type of news media -- well,
11:35:06 16 let me ask a different question. Did you ever talk
11:35:08 17 about the political persuasions of Mr. Brockman?

11:35:10 18 A. We didn't overtly discuss it, but it was made
11:35:13 19 very plain.

11:35:14 20 Q. Okay. And without getting too much into the
11:35:19 21 details of that, can you explain if -- well, just --
11:35:23 22 I mean, which way were they, without getting too
11:35:27 23 into it?

11:35:28 24 MR. VARNADO: Object to the relevance
11:35:29 25 of that.

11:35:30 1 THE COURT: Yeah, I'm trying to figure
11:35:32 2 out why that's relevant.

11:35:33 3 MR. MAGNANI:

11:35:34 4 Q. Doctor, only if you think it's relevant, was
11:35:36 5 there any meaning to him hearing of the January 6th
11:35:39 6 incident as a riot, but not having heard of it as an
11:35:42 7 insurrection?

11:35:42 8 A. His primary news source was the Wall Street
11:35:49 9 Journal.

11:35:50 10 Q. During your late August -- I'm sorry, late
11:35:54 11 October interviews, did you conduct competency
11:35:57 12 evaluation?

11:36:01 13 A. Collectively, Dr. Denney and I did in two
11:36:05 14 different ways. Prior to this October evaluation,
11:36:16 15 Dr. Denney and I discussed whether to use a
11:36:20 16 different instrument for measurement for competence
11:36:23 17 to stand trial -- having already used one -- should
11:36:28 18 we try another or repeat the same one.

11:36:31 19 And I had just attended a webinar
11:36:35 20 on cases of restoration of competence in which a
11:36:40 21 forensic neuropsychologist had described his
11:36:44 22 experience with the varying standardized instruments
11:36:48 23 used for competence to stand trial, and had come
11:36:52 24 down in favor of one called "The Evaluation of
11:36:58 25 Competence to Stand Trial Revised," the ECST-R.

11:37:06 1 So I had asked Dr. Denney what he
11:37:08 2 thought of using the ECST-R, and he was familiar
11:37:14 3 with it, had used it before, and agreed that would
11:37:17 4 be a good one to use. And so that was administered.

11:37:29 5 During that, the Defendant
11:37:31 6 demonstrated adequate knowledge of the consequences,
11:37:35 7 the seriousness of the matter, knowledge of the
11:37:37 8 courtroom participants. He was motivated to help
11:37:40 9 himself, and he expressed trust and confidence in
11:37:44 10 his attorneys. He said he would follow their
11:37:48 11 direction and advice, but he refused to discuss the
11:37:55 12 charges, which later led to Dr. Denney being able to
11:38:00 13 see him again briefly, at which time the instrument
11:38:06 14 was completed, but not in my presence.

11:38:09 15 Q. So is that part of this -- part of this ECST-R
11:38:16 16 was completed in your presence, and part of it not
11:38:18 17 in your presence?

11:38:19 18 A. Most of it was completed in my presence, but
11:38:23 19 some by Dr. Denney alone in a repeat visit.

11:38:27 20 Q. Do you know the results of that exam?

11:38:30 21 A. Yes.

11:38:31 22 Q. What were they?

11:38:37 23 A. That in each of the four categories that are
11:38:42 24 scored and assigned numbers, Mr. Brockman was in the
11:38:46 25 normal range for competence to stand trial.

11:38:51 1 Q. Now, do you know what competency measures --
11:38:54 2 well, were any competency measures used like this in
11:38:57 3 the defense exams in July and also October?

11:39:00 4 A. No. Not only didn't they use these
11:39:04 5 widely-accepted instruments for exploring and
11:39:08 6 measuring competence to stand trial, they did not
11:39:12 7 even interview him about all of the elements of
11:39:14 8 competence to stand trial.

11:39:20 9 Q. You talked about Mr. Brockman talking to you
11:39:23 10 about having full confidence in his attorneys. Did
11:39:28 11 he talk about any of those attorneys in particular?

11:39:31 12 A. Did he speak of them? Yes, he did.

11:39:33 13 Q. Okay. And did he spell one of those attorney's
11:39:36 14 names?

11:39:37 15 A. Well, interestingly, yes. That was
11:39:41 16 Ms. Keneally. In that instance, he was first asked
11:39:44 17 to spell her name and spell correctly. Later, after
11:39:48 18 a delay in time he was asked, "How do you spell that
11:39:53 19 name again?"

11:39:54 20 And he spelled Keneally without
11:39:58 21 being reminded whose name he was being asked to
11:40:01 22 spell. That is the kind of short term memory that
11:40:10 23 in his testing he scores in a way where it would not
11:40:14 24 be able to do a thing like that. So there's this
11:40:19 25 tremendous contradiction between what we sometimes

11:40:25 1 see in his real-world behavior, and what he's
11:40:31 2 showing then being tested and knows that it's his
11:40:37 3 memory and cognitive skills being tested.

11:40:39 4 That's a theme that was true
11:40:45 5 throughout this period in question that he behaved
11:40:47 6 differently when he was doing something anyone would
11:40:56 7 know is a test of how you are thinking, from how he
11:40:59 8 did when he wasn't undergoing a test of how he was
11:41:04 9 thinking.

11:41:04 10 Q. But even during the parts of the evaluation
11:41:09 11 that are not obviously testing, you would agree that
11:41:12 12 his presentation declined dramatically from May?

11:41:16 13 A. Yes. After May, and then reports saying that
11:41:22 14 he was malingering and saying in those reports that
11:41:27 15 there was this tremendous difference between how he
11:41:31 16 acted when he was being interviewed, and how he
11:41:34 17 performed in testing, his behavior changed. Um, so
11:41:40 18 that by July he was behaving demented in interview
11:41:47 19 and in testing.

11:41:52 20 Q. And just to -- I know we sort of took those in
11:41:55 21 pieces, each of those different exams. Can you just
11:41:58 22 sort of briefly discuss, I guess, the change over
11:42:01 23 time in those multiple interviews?

11:42:04 24 A. I would synopsise it this way that in May he
11:42:13 25 exhibited mild cognitive impairment. We could see

11:42:17 1 it. In July, he presented as significantly more
11:42:22 2 impaired throughout the exams done by the defense
11:42:27 3 experts.

11:42:28 4 In early October, he presented as
11:42:32 5 significantly impaired. Perhaps not quite as badly
11:42:37 6 as he had in July. It's a difference of degree, but
11:42:40 7 still impaired throughout. And when we saw him in
11:42:46 8 October, he presented as mildly impaired when we
11:42:49 9 were dealing with the competency issues, but more
11:42:53 10 impaired late in the afternoon around four o'clock
11:42:56 11 or so when there was such a sudden change in his
11:43:02 12 cognition that it was confusing.

11:43:08 13 He suddenly thought we were --
11:43:13 14 well, we asked who we were and what the purpose was.
11:43:17 15 He said that he thought we were there from a
11:43:21 16 research firm in San Francisco, hired by ADP, which
11:43:30 17 of course is a reference back to the civil dispute
11:43:33 18 with CDK.

11:43:46 19 And he also gave a mixture of
11:43:49 20 correct and absurd answers to mental status
11:43:53 21 examination questions. So for example, he was able
11:43:55 22 to correctly spell the word "World" backwards,
11:43:59 23 though he hadn't been able to in May. And yet, he
11:44:03 24 said that the year was 2051, and failed at
11:44:12 25 subtracting 3 from 20. And he persisted in that

11:44:21 1 failure even when Dr. Denney asked him, "Are you
11:44:25 2 saying that 20 minus 3 is 27?"

11:44:29 3 And he stuck to it and said, "Yes."

11:44:32 4 These were answers that we found
11:44:34 5 ridiculous to say it was 2051, and to not be able to
11:44:40 6 subtract 3 from 20, when he'd been very coherent on
11:44:44 7 many other things earlier in the day. That led me
11:44:57 8 to consider whether this was a phenomenon sometimes
11:45:00 9 referred to as sundowning, in which someone with
11:45:02 10 dementia behaves -- has a significant difference in
11:45:05 11 their cognitive function late in the day or after
11:45:11 12 dark or from fatigue. There's no single explanation
11:45:15 13 for why it occurs.

11:45:20 14 But I saw this as a fairly dramatic
11:45:23 15 change, and left confused about what his true mental
11:45:27 16 state was, because there'd been such variability.
11:45:36 17 And I had a week to turn around a report. Didn't
11:45:39 18 have the benefit of some of the other data that had
11:45:43 19 by then come into existence and wrote a report in
11:45:46 20 which I concluded that I couldn't tell whether this
11:45:50 21 was genuine cognitive impairment to a degree that
11:45:55 22 could make this man incompetent or whether this was
11:45:58 23 malingering. I didn't feel I had the tools to make
11:46:03 24 that distinction at that time.

11:46:10 25 Then, subsequently I received

11:46:11 1 additional information that I thought did clarify.

11:46:20 2 Q. And what was one of the major things that
11:46:22 3 helped you resolve this uncertainty that you left
11:46:24 4 the October 20th exam with?

11:46:28 5 A. Um, I would say there were two things. First,
11:46:32 6 I gained a better understanding of the limits of
11:46:37 7 what we could learn from the brain imaging, and how
11:46:42 8 much weight could be put on it with respect to an
11:46:48 9 assessment of cognitive function.

11:46:49 10 Second, I learned about the lengths
11:47:01 11 to which the profession of neuropsychology has gone
11:47:05 12 to establish the validity of neuropsychological
11:47:12 13 testing in contested settings, and the statistical
11:47:21 14 safeguards in place with respect the sensitivity and
11:47:27 15 specificity of declarations of invalid test
11:47:33 16 performance. And when I had a better grasp of the
11:47:42 17 current state of that literature, I believe that all
11:47:48 18 of the neuropsychological testing that had been done
11:47:51 19 from early 2019, up to last month, was invalid and
11:47:58 20 can't be relied on for anything.

11:48:03 21 Q. And, Doctor, you mentioned a few times, but can
11:48:08 22 you sort of very quickly just explain when you wrote
11:48:10 23 each of your reports and basically what the top-line
11:48:13 24 conclusion was -- just the timeline of your thinking
11:48:17 25 on this?

11:48:18 1 **A.** My reports were June 21st of this year, in
11:48:24 2 which I concluded he was malingering and competent.

11:48:30 3 October 29th, in which I said I
11:48:32 4 couldn't tell on competency or extent of cognitive
11:48:39 5 impairment.

11:48:40 6 November 4th, when I concluded that
11:48:47 7 he is presently competent and that what had looked
11:48:56 8 like cognitive impairment was malingered -- there
11:48:59 9 was an exaggeration of the extent of it, though the
11:49:04 10 truth is most likely he suffers from either mild
11:49:08 11 cognitive impairment or earlier mild dementia.

11:49:12 12 **Q.** And I just want -- in going into your -- well,
11:49:16 13 can you explain, I guess, the basis for your opinion
11:49:18 14 that Mr. Brockman is malingering?

11:49:23 15 **A.** Yes, there are a number of bases for this view.
11:49:26 16 First of all, he has extreme motivation to avoid
11:49:36 17 prosecution. One has to look at the context, and
11:49:41 18 the context is that this could be the magic bullet
11:49:46 19 for escaping the consequences of any criminal
11:49:51 20 conduct that may have occurred.

11:49:53 21 I'm not making a judgment as to
11:49:55 22 that, Your Honor.

11:49:57 23 Second, I consider there to be a
11:50:04 24 suspicious timeline of the initial assessment of his
11:50:08 25 memory complaints. There was an e-mail -- that's

11:50:13 1 Government Exhibit 104 -- that Dr. Yudofsky received
11:50:19 2 in which Mr. Brockman's asking for help because of
11:50:23 3 his memory. And Dr. Yudofsky replies saying, "Well,
11:50:30 4 you know I'm a neuropsychiatrist" -- which of course
11:50:34 5 Mr. Brockman had sponsored in a big way -- and yet,
11:50:41 6 no immediate action is taken. This is May of 2017.

11:50:47 7 But in June of the following year,
11:50:53 8 Mr. Brockman takes Dr. Yudofsky along with the group
11:50:56 9 on a fishing trip to Alaska. And while there,
11:51:02 10 learns of the raid in Bermuda on Tamine's residence.

11:51:09 11 Q. Just to interrupt you, Doctor, I think you said
11:51:12 12 June. Was this in June --

11:51:14 13 A. September.

11:51:15 14 Q. Okay.

11:51:15 15 A. Sorry, I misspoke.

11:51:18 16 Q. Yeah, that's okay.

11:51:22 17 A. So the September 5th raid in Bermuda is made

11:51:26 18 known to Mr. Brockman, who the next day e-mails

11:51:35 19 Dr. Lerner asking for an appointment. And

11:51:40 20 Dr. Lerner, in that visit, which occurs on

11:51:44 21 September 11th, refers Mr. Brockman to Dr. Pool,

11:51:51 22 even though Dr. Lerner knows that Dr. Lisse is

11:51:56 23 already the primary care doctor for Mr. Brockman.

11:52:08 24 Q. Let me stop you there. You said Lisse is the

11:52:11 25 primary care doctor. Did Mr. Brockman get a new

11:52:14 1 primary care doctor after this search warrant?

11:52:16 2 **A.** Yes, he does. That's Dr. Pool.

11:52:19 3 **Q.** Okay.

11:52:25 4 **A.** And on the first visit with Dr. Pool on
11:52:28 5 October 15th, Mr. Brockman tells him that, "My
11:52:32 6 memory is failing more."

11:52:37 7 **Q.** I'm sorry. Actually, Doctor, can you go back
11:52:40 8 to the previous slide? Just to make this easy, I'd
11:52:42 9 like to move to admit -- I'm not going to show all
11:52:45 10 of these exhibits that go into this timeline, but I
11:52:48 11 would like them to be in evidence. So --

11:52:49 12 THE COURT: Okay.

11:52:50 13 MR. MAGNANI: -- I move to admit
11:52:52 14 Exhibit 29, 59, 104 -- which actually I think 104
11:53:00 15 might also be Defense Exhibit 1, but move it in
11:53:04 16 anyway. Oh, did I misspeak?

11:53:09 17 THE COURT: You said 59. I think you
11:53:11 18 meant 49.

11:53:14 19 MR. MAGNANI: Well, to be candid,
11:53:16 20 there's a discrepancy in my notes and the
11:53:19 21 PowerPoint. I'll do this at another time, Your
11:53:21 22 Honor.

11:53:21 23 THE COURT: Okay. Are you sure? I
11:53:22 24 mean --

11:53:23 25 MR. MAGNANI: Okay. Dr. Dietz is

11:53:24 1 correct, it's 49.

11:53:26 2 THE COURT: Okay.

11:53:28 3 MR. MAGNANI: So I'm sorry. So one at
11:53:31 4 a time. 29.

11:53:32 5 MR. VARNADO: I'll take a look at break
11:53:34 6 and let you know, Judge.

11:53:35 7 MR. MAGNANI: For the record, I told
11:53:36 8 Defense Counsel I was going to try to move all of
11:53:40 9 these in before, but we can take it up later. I'll
11:53:43 10 just say it again now. I'm going to move all of
11:53:45 11 these in after the break.

11:53:47 12 MR. VARNADO: Yeah, just bring them up,
11:53:50 13 and we'll give an answer like we said.

11:53:52 14 MR. MAGNANI: So what I'm hearing right
11:53:54 15 now -- is there an objection or not to 29?

11:53:56 16 THE COURT: Well, he wants to reserve
11:53:57 17 his objection until after the break.

11:53:59 18 MR. VARNADO: Just like to take a look,
11:54:01 19 Judge, that's all.

11:54:02 20 THE COURT: He says that he's reserving
11:54:04 21 his right to object after the break. Not a problem.
11:54:06 22 We can keep going. Just have to remember when we
11:54:10 23 come back to move to admit them.

11:54:14 24 MR. MAGNANI: I will. Thank you.

11:54:15 25 THE COURT: Or you can move -- or other

11:54:17 1 alternative, move to admit them now and then I can
11:54:19 2 consider the objection, if any, later.

11:54:21 3 MR. MAGNANI: Yeah, I think we can move
11:54:23 4 it along right now and we'll handle this after.

11:54:25 5 Q. So I apologize for interrupting, Dr. Dietz.
11:54:27 6 Can you tell -- you were just telling us about the
11:54:30 7 timeline, and the last thing I believe you testified
11:54:32 8 about was his first visit with Dr. Pool. Can you
11:54:36 9 keep us going from there?

11:54:38 10 A. Yes -- well, while this is still on, let me
11:54:40 11 explain that this is not the first complaint of
11:54:43 12 memory. Mr. Brockman did create annual health
11:54:50 13 summaries for his treating doctors. And in those
11:54:53 14 summaries, he has memory complaints going back
11:54:57 15 before 2015, all the way to -- I think -- 2008. And
11:55:03 16 the complaints that he's making are that, "I'm
11:55:07 17 having some trouble with memory, especially the
11:55:09 18 names," and that gradually worsens.

11:55:17 19 This is commented on memory
11:55:19 20 complaints by doctors before this period that we're
11:55:21 21 talking about who attribute it to normal age. And
11:55:27 22 that's a common phenomenon for people to begin to
11:55:31 23 take longer to remember a name or not be able to
11:55:35 24 recall a name. That does not necessarily indicate
11:55:40 25 dementia. The aging brain gets slower at some of

11:55:46 1 these tasks.

11:55:47 2 The first person to notice that is
11:55:49 3 usually the patient. And I've seen instances in
11:55:56 4 which colleagues have began to doubt themselves and
11:55:59 5 gone to get neuropsychological testing for fear of
11:56:03 6 having neurodegenerative disease, and it turns out
11:56:06 7 they're normal for their age. They keep practicing
11:56:09 8 another 20 years.

11:56:10 9 So the earlier memory complaints
11:56:17 10 that resulted in no action beyond reassurance I
11:56:21 11 think were appropriately handled at the time.
11:56:24 12 What's different is that here in May of 2017,
11:56:31 13 Mr. Brockman is writing to his friend and buddy
11:56:39 14 about memory problems and asking for help, but
11:56:44 15 nothing occurs by way of a workup then.

11:56:49 16 Dr. Yudofsky knows exactly how to
11:56:51 17 go work up someone for a memory problem, who they
11:56:55 18 should see, what tests should be done and so on.
11:56:58 19 And later -- a year later he recommends all of that.
11:57:04 20 But it wasn't done until after this raid. So that's
11:57:08 21 why I regard this as suspicious timing.

11:57:13 22 Now, to go on from that issue, it's
11:57:21 23 on October 20th of 2018, that Dr. Yudofsky creates a
11:57:27 24 medical record treating Mr. Brockman as a patient.
11:57:34 25 And it's a record in which he diagnoses mild to

11:57:39 1 moderate neurocognitive disorder. He refers
11:57:44 2 Mr. Brockman for an assessment of Parkinson's
11:57:47 3 disease, which would normally be a neurologist; a
11:57:54 4 comprehensive medical workup, which could be done by
11:57:57 5 a GP and neuropsychological testing.

11:58:09 6 It's unclear to me who the
11:58:11 7 reporting party was for Dr. Pool, and Dr. York, and
11:58:17 8 Dr. Jankovic. And Dr. Pool says he's doing those
11:58:26 9 referrals, Dr. Yudofsky is talking about those
11:58:30 10 referrals, and Dr. York says that this is a patient
11:58:36 11 referred by Dr. Pool and I think mentions
11:58:40 12 Dr. Yudofsky in that. So maybe they're both doing
11:58:46 13 referrals, but this is all things that one would
11:58:51 14 have expected to have occurred a year earlier.

11:58:56 15 Q. And when you talk about the referral, do you
11:58:58 16 remember specifically how Mr. Brockman was referred
11:59:01 17 on? Well, do you remember how Mr. Brockman was
11:59:07 18 referred to when these referrals were made?

11:59:12 19 A. Well, I know that Dr. York's records reflect
11:59:16 20 that this was a VIP patient of Dr. Pool. Is that
11:59:24 21 what you are asking me about?

11:59:26 22 Q. Yes. And so, after -- after these October
11:59:32 23 appointments with Doctors Pool and Yudofsky, what
11:59:37 24 happens next?

11:59:42 25 A. Mr. Brockman made a million dollar donation to

11:59:46 1 Baylor Medical College, "Attention: Dr. Seth
11:59:53 2 Lerner."

11:59:53 3 Q. Who is Dr. Seth Lerner?

11:59:56 4 A. The urologist that he had seen after the Alaska
12:00:00 5 fishing trip.

12:00:02 6 Q. Okay. And then what happened after this
12:00:04 7 donation?

12:00:10 8 A. In January, he saw Dr. Jankovic -- I
12:00:13 9 mispronounced that, I'm sorry -- Dr. Jankovic on
12:00:18 10 referral from Doctors Pool and Yudofsky. And at
12:00:21 11 that visit to a neurologist and memory expert, he
12:00:26 12 reports a history of concentration and memory
12:00:29 13 problems, having gone on for one and a half years
12:00:33 14 and having had depression for six months.

12:00:39 15 And he had called MoCa 19 out of
12:00:43 16 30.

12:00:44 17 Q. As you describe it, what sort of doctor is
12:00:47 18 Dr. Jankovic?

12:00:50 19 A. I believe he's a neurologist with special
12:00:55 20 interest in memory.

12:00:56 21 Q. Who did he see after Dr. Jankovic?

12:01:01 22 A. Dr. York for the neuropsychological test
12:01:05 23 battery the first of three times.

12:01:12 24 Q. Did -- as far as you are aware, did any other
12:01:14 25 doctor do a testing battery before Dr. York in

12:01:19 1 March 2019?

12:01:22 2 **A.** I'm not aware of any testing battery before
12:01:24 3 that.

12:01:24 4 **Q.** What was -- how -- did Dr. York estimate the
12:01:29 5 Defendant's IQ at that time?

12:01:32 6 **A.** Yes. From that testing in March of 2019, she
12:01:35 7 said he had a full-scale IQ of 87.

12:01:39 8 **Q.** Do you know if Dr. York had reviewed any of the
12:01:43 9 videotaped deposition transcripts -- I'm sorry,
12:01:47 10 deposition videos that Mr. Brockman gave just two
12:01:49 11 months before?

12:01:50 12 **A.** I'm sure she didn't, but there's no mention of
12:01:53 13 it one way or the other.

12:01:55 14 **Q.** So -- I mean, what was -- what was Dr. York's
12:02:02 15 -- what were the pillars that were supporting her
12:02:05 16 conclusions?

12:02:07 17 **A.** Well, I think there were three things. Her
12:02:15 18 test results, which she learned from collaterals,
12:02:18 19 who would have been Mr. Brockman's wife and son, and
12:02:24 20 what Mr. Brockman told her.

12:02:30 21 **Q.** And how -- I mean -- and you mention that, you
12:02:34 22 know, she didn't reference any of those videos. Do
12:02:36 23 you know if she had access to any of Mr. Brockman's
12:02:39 24 e-mails he was composing at that time?

12:02:41 25 **A.** Um, she is silent about any sources, other than

12:02:45 1 the ones I mentioned in the medical records. But
12:02:48 2 there's no reason she would be expected to have his
12:02:53 3 e-mails or his -- videotapes of speeches or
12:02:57 4 testimony, or deposition transcripts. Clinicians
12:03:01 5 aren't going to keep that stuff anyway.

12:03:04 6 Q. So these bases you say her -- her opinion was
12:03:07 7 dependent upon, are those the same bases that
12:03:14 8 supported the defense letter that we looked at
12:03:16 9 before regarding Mr. Brockman's competency?

12:03:19 10 A. That's right.

12:03:21 11 Q. And so, before the involvement of the defense
12:03:24 12 experts in this case from the forensic panel, is it
12:03:27 13 fair to say that these same bases were relied on for
12:03:30 14 other dementia diagnoses?

12:03:32 15 A. Correct.

12:03:47 16 Q. How would you describe the consistency in these
12:03:51 17 different sources over time?

12:03:56 18 A. Those three sources of how he acts and what his
12:04:06 19 family says about his impairment and what happens on
12:04:12 20 neuropsych testing, I would say that the first two
12:04:20 21 look worse and worse. The third -- the testing --
12:04:24 22 is flat-lined at the bottom from the beginning.

12:04:28 23 Q. And so, what I want to do now, Doctor, is move
12:04:35 24 ahead in -- well, let me ask you. Did you prepare a
12:04:39 25 demonstrative exhibit that's in your slide deck?

12:04:42 1 A. Yes.

12:04:42 2 Q. Okay. Can you please move to that, now? So,
12:04:48 3 Doctor, can you -- well, can you explain this?

12:04:53 4 A. Yes. The amount of data here was so confusing
12:05:01 5 that it seemed a good idea to have a graphic
12:05:05 6 representation to clarify what some of these
12:05:07 7 discrepancies are that various experts have pointed
12:05:13 8 to. So the top line of this graph is Mr. Brockman's
12:05:22 9 functioning as CEO, as businessman -- his
12:05:28 10 functioning in the real, external world. And for
12:05:32 11 that, we have evidence of what I regard as superior
12:05:39 12 functioning of his cognitive capacities through his
12:05:46 13 speeches, through his testimony, and through his
12:05:48 14 e-mails that extends through 2019, and up to
12:05:58 15 November of 2020 when the window closes and I have
12:06:05 16 no access to data about his acts in the real world.

12:06:16 17 From that point on, he's only in
12:06:18 18 contact with a very small number of people, and
12:06:22 19 there is no e-mail stream. And that small number of
12:06:26 20 people are those closest to him -- those in his
12:06:31 21 household, those in his family, and long-term
12:06:37 22 trusted friends.

12:06:43 23 So at that point, I can't evaluate
12:06:46 24 with what I regard as the objective means brought to
12:06:48 25 bear on the videotape speeches, the testimony

12:06:53 1 transcripts, and his own e-mails.

12:06:58 2 The second level here is
12:07:01 3 represented by the X's for the MRIs. The MRI's both
12:07:08 4 in November and July are normal in a way that can't
12:07:17 5 really inform us about his cognitive function.
12:07:24 6 Certainly consistent with the superior performance
12:07:28 7 we see. No contradiction there.

12:07:33 8 And on imaging, I'll point to the
12:07:36 9 blue line to the right. When Dr. Darby orders the
12:07:43 10 FDG-PET scans, we get two points at which we can
12:07:49 11 look at how his brain metabolism is. And that shows
12:08:03 12 some possible decrease between March and August, but
12:08:14 13 is not looking very bad even then.

12:08:19 14 MR. VARNADO: Your Honor, just state an
12:08:20 15 objection of this witness's basis for this making
12:08:22 16 this testimony about the FDG-PET and it's impact on
12:08:27 17 cognitive functioning representing on a particular
12:08:29 18 graph. This is just not his area.

12:08:30 19 THE COURT: Objection overruled. He
12:08:32 20 looked at it.

12:08:35 21 Doctor, you looked at this
12:08:36 22 information and used it in the preparation of your
12:08:38 23 graph; correct?

12:08:39 24 THE WITNESS: Yes, Your Honor.

12:08:40 25 THE COURT: Objection overruled. You

12:08:42 1 may continue.

12:08:45 2 THE WITNESS: And I should say, this
12:08:50 3 graph is a collaborative effort. Dr. Denney,
12:08:54 4 Dr. Darby, and I all spoke on the phone with a
12:08:58 5 graphic artist, at the same time saying which lines
12:09:03 6 to move where and which colors would be better. The
12:09:10 7 black line on this graph is, I think, an inadequate
12:09:17 8 detailed representation of what Mr. Brockman is
12:09:24 9 telling doctors. He seems to be telling doctors
12:09:30 10 over time a narrative consistent with decline.

12:09:34 11 And I say this is inadequately
12:09:38 12 represented here, because it's not really tied to
12:09:40 13 specific dates. It doesn't show the three bouts of
12:09:45 14 delirium this year well enough, but the story is one
12:09:49 15 of decline based on what doctors observed and hear
12:09:55 16 Mr. Brockman say.

12:09:58 17 And down at the bottom, the lowest
12:10:01 18 line from March 2019 on, this is the flat-lined
12:10:07 19 memory functioning shown by neuropsychological tests
12:10:12 20 in which Mr. Brockman, again, and again, and again
12:10:17 21 performs in the lowest first percentile. And it
12:10:24 22 does not make sense that that could be valid in
12:10:29 23 light of his real-world performance on the top line.

12:10:34 24 It is as dramatic a contradiction
12:10:36 25 as one can find. I believe Dr. Denney testified

1 that one of the scores was the lowest he'd seen in
2 his career. So my puzzlement after our October
3 exam, and continuing concerns about this case have
4 to do with these apparently big contradictions
5 between how Mr. Brockman appears, depending on how
6 we're looking. It's very much like an old parable
7 about blind men and an elephant, in which what you
8 look at, what you feel, the data you have determine
9 what your impression of what this is. And to put it
10 in its simplest terms, if you look at his
11 functioning in the world to the extent you can, he
12 is clearly competent and highly functional, and has
13 little or no cognitive impairment as long as we're
14 able to look at that up until November of 2020.

15 If you look at how he's behaving
16 around doctors, and the story he's telling doctors
17 and what his intimates are telling doctors, it looks
18 like a story of progressive impairment and
19 deterioration. If you look at his brain studies,
20 they don't appear to be in the abnormal range to the
21 extent that the narrative seems to be.

22 And if you look at when he does
23 informal neurocognitive test batteries, he's got no
24 memory at all. He's got this terrible, terrible
25 memory problem that's not reflected in any of the

12:12:53 1 other sources. Couple that with the repeated,
12:13:02 2 invalid test performance, that makes it a
12:13:05 3 statistical improbability of substantial degree that
12:13:12 4 any of the neuropsych testing is valid. I can only
12:13:18 5 conclude that the only explanation that fits all of
12:13:21 6 the facts is that he's exaggerating the extent of
12:13:25 7 his impairment, and that he was exaggerating that in
12:13:32 8 March 2019, and continues to.

12:13:37 9 MR. MAGNANI: Your Honor, I know that
12:13:38 10 you wanted to break around 12:15.

12:13:42 11 THE COURT: Yeah, this is a good time,
12:13:43 12 because I need to get ready for the hearing. Do you
12:13:45 13 want more time to consider the objections?

12:13:50 14 MR. VARNADO: Look at the documents
12:13:51 15 right now, and as soon as we come back, Your Honor.

12:13:53 16 THE COURT: We'll go ahead, everyone,
12:13:55 17 and recess until 1:15. Again, you don't have to
12:13:59 18 clear out anything. You can leave everything where
12:14:02 19 it is.

12:14:03 20 MR. VARNADO: Thank you, Judge.

21 (WHEREUPON, THE PROCEEDINGS WERE RECESSED AT 12:14
22 P.M.)

23 ---oOo---


24

25

C E R T I F I C A T E

I hereby certify that pursuant to Title 28,
Section 753 United States Code, the foregoing is a
true and correct transcript of the stenographically
reported proceedings in the above matter.

Certified on 11/20/2021.



Sean Gumm, RPR, CRR

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